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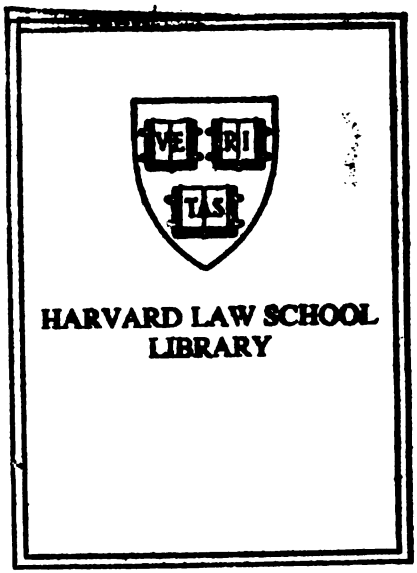

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MARYLAND REPORTS,

CONTAINING

CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

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VOL. VIII.

CONTAINING CASES IN DECEMBER TERM, 1855.

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Rec. Nov. 6, 1837

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NAMES OF THE JUDGES, &c.,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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HON. JOHN BOWERS ECCLESTON, Associate Justice.
HON. WILLIAM HALLAM TUCK, Associate Justice.
HON. JOHN THOMSON MASON, Associate Justice.

OF THE CIRCUIT COURTS.

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HON. PETER W. CRAIN.

SECOND JUDICIAL CIRCUIT.—*Anne Arundel*, *Howard*, *Calvert* and *Montgomery* counties.
HON. NICHOLAS BREWER.

THIRD JUDICIAL CIRCUIT.—*Frederick* and *Carroll* counties.
HON. MADISON NELSON.

FOURTH JUDICIAL CIRCUIT.—*Washington* and *Allegany* counties.
HON. THOMAS PERRY.

SIXTH JUDICIAL CIRCUIT.—*Baltimore*, *Harford* and *Cecil* counties.
HON. JAMES M. BUCHANAN,
Appointed by the Governor September 3rd, 1855, *vice* CONSTABLE, deceased.
HON. JOHN H. PRICE,
Elected November 7th, 1855.

SEVENTH JUDICIAL CIRCUIT.—*Kent*, *Queen Anne*, *Talbot* and *Caroline* counties.
HON. PHILEMON B. HOPPER.

EIGHTH JUDICIAL CIRCUIT.—*Dorchester*, *Somerset* and *Worcester* counties.
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Appointed by the Governor August 4th, 1855, *vice* FRICK, deceased.

HON. Z. COLLINS LEE,
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OF THE CRIMINAL COURT OF BALTIMORE.

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MARYLAND REPORTS.

DECEMBER TERM, A. D., 1855.

JOHN EYLER and JONAS MATTHEWS, *vs.* JESSE HOOVER, Exc'r of FREDERICK CRABBS.

Where a cause is remanded under the act of 1832, ch. 302, and a decree is passed in conformity with the decision of the appellate court, this decree must upon a second appeal be affirmed.

A decree will not be reversed for an error by which the appellant has suffered no injury.

APPEAL from the Equity Side of the Circuit Court for Frederick county.

This is the second appeal in this case. The bill was filed on the 13th of October 1845, by Crabbs against Eyler and Matthews, to enforce a vendor's lien for a balance of unpaid purchase money due for certain lands sold and conveyed by complainant to Eyler, and also to annul a deed by which Eyler subsequently conveyed the property to Matthews. The bill refers to and makes an exhibit of a former proceeding in equity, commenced by Crabbs against Eyler before the conveyance by the latter to Matthews, to enforce the vendor's lien for this property, which resulted in a decree for the sale thereof, but the record of these proceedings was not proved under the commission nor certified under the seal of the court in which they were had. There were also in the record short copies of two judgments in favor of Crabbs against Eyler upon the notes given by the latter for this purchase money, recovered on the 3rd of March 1845, and of writs of *fi. fa.* issued

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thereon on the 8th of May 1845, and returned "*nulla bona*" on the 4th Monday of October 1845, but the record did not show how these papers were introduced into the case. The court below passed a decree for the sale of the property, from which the defendants appealed, and the appellate court, without reversing or affirming the decree, remanded the cause under the act of 1832, ch. 302. This appeal is reported in 2 *Md. Rep.*, 137. In that case the court decided, that as the *record then stood* there was no proof either that Eyler was insolvent or that complainant had exhausted all his other remedies before he filed his bill. They say, however, "had the record in the former proceeding been duly verified, or had the evidence of returns of *nulla bona* to the writs of *fi. fa.* been properly introduced into the case, we should have felt bound to have affirmed the decree of the county court." 2 *Md. Rep.*, 155.

After the cause was remanded, Crabbs having died, Hoover, his executor, was made a party complainant, and a commission issued under which certified copies of the record and writs of *fi. fa.*, above referred to, were duly proved. The case was then submitted and the court below, (FREDERICK A. SCHLEY, Special Judge,) passed the same decree as in the former appeal. This decree directs the defendants to pay the complainant, or bring into court for that purpose, $2031.86, with interest from the 6th of January 1845, and in default thereof directs the land to be sold for the payment of this sum. From this decree the defendants took the present appeal.

The cause was argued before LE GRAND, C. J., TUCK and MASON, J.

William P. Maulsby for the appellants, argued:

1st. That the proof produced is not sufficient to gratify the requirements of this court, because it does not show that *at the time* of filing the bill the complainant had exhausted all his remedies at law against Eyler. All that the court did on the former appeal was to decide the *points* then before it. They then decided the legal *principle* that the complainant

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could not resort to his lien until he had exhausted his remedy at law, and *nothing more*. The case of *Young vs. Frost*, 1 *Md. Rep.*, 377, does not preclude inquiry into the sufficiency of the evidence subsequently introduced to sustain the decree, but only decides that new evidence cannot be introduced to vary the *principle* of the decree so as to raise other equities. The decision on the former appeal therefore leaves entirely unembarrassed the inquiry, whether the evidence introduced was *sufficient* to bring the case within the *principle* there decided. Now what is the effect of the introduction of the record in the former case into this? The fact that proceedings in equity were instituted against *Eyler*, proves nothing as to the exhaustion of remedies at law against the parties to this bill, *Eyler and Matthews*. It is only evidence of *notice* to Matthews of the decree against Eyler, but is no step in showing the exhaustion of remedies against *both*. Again, the returns in this case to the writs of *nulla bona* are not *sufficient* proof of the insolvency of Eyler *at the time the* bill was filed. These returns were not made until *after* the filing of the bill though the writs were issued before, and they do not say that Eyler *had* no property on which the writs could have been levied *during the time they were in the officer's hands*.

2nd. The decree must be reversed, because it requires the payment of compound interest from the 6th of January 1845, to the 23rd of May 1854, the date of the decree. The report of the auditor shows that the sum of $2031.86 *included the interest* on the purchase money in arrear and due on the 6th of January 1845, and the decree therefore requires the payment of compound interest for more than nine years.

Joseph M. Palmer for the appellee, argued:

1st. That the decree appealed from in this case is in strict conformity with the decision of the Court of Appeals in the former appeal, and is *therefore* correct. The decree or judgment in the former case is final and conclusive, not only as to what was actually decided, but also as to what could have arisen in that case upon the facts in it. The act of 1832, ch. 302, sec. 6, requires this court to pass an opinion upon the

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merits of the case and makes that opinion conclusive upon the court below. In *Young vs. Frost*, 1 *Md. Rep.*, 394, the court say, "the decision of the Court of Appeals must be taken as conclusive on all points which were made before the Court of Appeals or which were presented by the record, and no error can be imputed to the court below if its subsequent proceedings have been in conformity with the principles of that decree." The cases of *Mong vs. Bell*, 7 *Gill*, 245, and *McClellan vs. Crook*, *Ibid.*, 333, are also cases directly in point. Whatever therefore was decided by the Court of Appeals on the former appeal in this case, or which could have been argued or decided then, cannot now be open for decision or argument again. But suppose we can go behind that decree, there is still no difficulty in the case, for the proceedings in equity proved in the record *establish the fact* that the remedies at law had been exhausted. Again, if this be not so, the returns of *nulla bona* clearly establish the insolvency of Eyler at the time of the filing of this bill, for they relate back to the issuing of the writs of *fi. fa.*, which bind the personal property from the time they went into the officer's hands. If *either* proposition, viz: the insolvency of Eyler *or* the exhaustion of remedies at law, be established, it is sufficient to sustain the decree.

2nd. It is no ground for reversal that the decree directs payment of interest from the 6th of January 1845, for by this the appellee gets no more than he was entitled to, for if interest had been computed on the judgments from the date of their rendition, with costs, the amount would have exceeded that directed by the decree to be paid. The appellant has therefore suffered no injury by this calculation, even if it be erroneous.

Note.—Other points were argued by counsel, which need not be stated.

Le Grand, C. J., delivered the opinion of this court.

We are of opinion that the questions involved in this case were definitively settled by the decision which was pronounced when it was before this court at June term 1852. The court then said, if certain papers which were in the record were

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duly verified and proved, the complainant would be entitled to the relief asked. 2 *Md. Rep.*, 137. To enable him to supply the deficiency pointed out the case was remanded. It has been supplied and the case is now in a condition to warrant such a decree as has been passed by the court below, and we accordingly affirm it.

In regard to the point raised by the counsel for the appellants, that the decree was for a larger amount than was due, it is but necessary to observe, that if the auditor committed an error in computing interest from the 6th January 1845, it is not such an error as ought to enure to the reversal of the decree; because, if the interest were computed on the judgments at law which were rendered on the 3rd March 1845, instead of on the amount of the decree passed against Eyler on the 6th of January 1845, and to the sum thus ascertained the costs of the proceedings at law were added, the complainant would be entitled to a decree for a larger amount than he has obtained. This being so, the defendants cannot in justice ask a reversal of the decree.

Decree affirmed with costs.

Abraham Lammott *vs.* William P. Maulsby.

No appeal lies to this court from an order of an orphans court revoking an indenture of apprenticeship under the act of 1842, ch. 25, that act having provided an appeal in such cases to the county court.

Where an inferior court exercises a special limited jurisdiction conferred by statute, no appeal from its decisions in such cases lies to this court unless expressly given by the statute.

Under the act of 1842, ch. 25, the orphans court may, upon suggestion, in writing, made by counsel, without making the apprentice a formal party, take proof and set aside his indentures.

Appeal from the Orphans Court of Carroll county.

In this case the orphans court bound out a free colored boy to the appellant, by indenture, dated the 31st of July 1854.

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On the 9th of October of the same year, the appellee filed a suggestion, in writing, to the court, stating that the indentures were not in conformity with the act of 1839, ch. 35, under which the court professed to act, for various reasons therein set out. The court took the testimony of witnesses, and on the 5th of December, passed an order revoking and annulling the indentures previously granted. From this order the appellant appealed *to this court*.

The appellee moved to dismiss this appeal, because, by the act of 1842, ch. 25, the orphans courts of the several counties are empowered to hear and determine all matters in dispute between masters and apprentices; to grant releases to apprentices heretofore bound; and to do all other acts in relation to masters and apprentices that are now exercised by the county courts, and an appeal given to the *county courts*, and therefore no appeal lies to *this court*.

This motion and the merits of the case were argued before Eccleston, Tuck and Mason, J.

James Raymond for the appellant, argued:

1st. That the appellee shows no interest in this case, and discloses nothing by his suggestion or information which gives the court below any jurisdiction to entertain it, and therefore the whole proceedings are *coram non judice*.

2nd. The act of 1842, ch. 25, only confers upon the orphans courts the authority which the county courts had under the act of 1793, ch. 45, and by this latter act the proceedings must be commenced by petition, *in writing*, by the apprentice. Here there was no such *petition* by the *apprentice*, and the case, therefore, was not within the *jurisdiction* of any court; and a judgment thus unwarrantably pronounced will be reversed on appeal to this court. Again, the appeal is warranted by the express terms of the act of 1818, ch. 204, which says, "that in *all decrees, orders*, decisions and judgments" thereafter to be made by any orphans court, the party aggrieved may appeal to the *Court of Appeals*.

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Oliver Miller for the appellee, argued:

That the act of 1842, ch. 25, by its first section, gives *jurisdiction* to the orphans courts to grant releases to apprentices, and to do all other acts in relation to masters and apprentices that are now exercised by the county courts. The language is broad and comprehensive, and does not prescribe the *mode* in which this authority is to be invoked: it may be done on *petition* by the apprentice, upon suggestion of an attorney, as *amicus curiæ*, or of any disinterested person, or by the court itself, *mero motu*. The second section, in just as broad terms, gives an appeal in *all cases*, in which the jurisdiction conferred by the first section is exerted, to the county courts. This is, therefore, a case of new, special and limited authority given by act of Assembly to a court of limited jurisdiction, and the right of appeal given by the same act to the county courts. In such case no appeal lies to *this court*. 8 *G. & J.*, 443, *Wilmington & Susquehanna Rail Road Co. vs. Condon*. 5 *Gill*, 88, *Williams vs. Williams*. 9 *Gill*, 92, *Webster vs. Cockey*. The general provisions relating to appeals, contained in the act of 1818, ch. 204, does not warrant this appeal any more than the general provisions relating to appeals from the county courts warranted the appeals in the cases above cited. The provisions in both laws are equally comprehensive, and if the appeal would not lie in the one case it cannot in the other. This appeal, therefore, must be dismissed.

Eccleston, J., delivered the opinion of this court.

The act of 1842, ch. 25, conferred upon the orphans courts special limited jurisdiction, such as they previously did not possess. And the second section, in express terms, gave a right of appealing to the county court in all cases arising under the act. If, therefore, the present case is within the jurisdiction thus given, there can be no appeal to this court.

The case of the *Wilmington & Susquehanna Rail Road Co. vs. Condon*, 8 *G. & J.*, 443, came up under a decision of the county court in reference to an inquisition taken under the law authorising the condemnation of land for the construction of the road. The appeal was dismissed. And the court

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say: "There is no appeal expressly given to the Court of Appeals, under the act of Assembly investing the county court with the power of reviewing and confirming, or setting aside, inquisitions like the present. From the nature and course of their proceedings, this power of review is a fit subject for litigation in a county court, but is wholly inappropriate to the jurisdiction of this court. It is a special limited jurisdiction given to the county court, from the decision of which no appeal lies to any other tribunal."

In *Williams vs. Williams, 5 Gill*, 88, the county court had passed an order in reference to proceedings in insolvency, from which an appeal was taken, but dismissed, the court being of opinion that no right of appeal existed. They say: "No act of Assembly authorises it; and we must reverse the decision of this court in the case of the *Wilmington & Susquehanna Rail Road Co. against Condon*, (8 *G. & J.*, 443,) before we can entertain this appeal. This is no case either of law or equity. There can be no right of appeal in such a case as this."

The appellant's counsel contends, that the motion to dismiss cannot be sustained, because although the act of 1842 gives an appeal to the county court and to no other tribunal, nevertheless the present appeal is sanctioned by the general and comprehensive language of the act of 1818, ch. 204, which provides, "that in all decrees, orders, decisions and judgments" thereafter to be made by any orphans court, the party aggrieved may appeal to the Court of Appeals. But the general right of appeal from the decisions of the county court was quite as broad and comprehensive as that given by the act of 1818, and yet we have seen, that in the cases of the *Wilmington & Susquehanna Rail Road Co. vs. Condon* and *Williams vs. Williams*, the appeals were dismissed, because the decisions were made by the county courts under statutes conferring special limited jurisdiction, and making no provision for appeals.

If in those cases the Court of Appeals had no authority to review the decisions, there can be no good reason for supposing we possess any appellate jurisdiction in reference to cases arising under the act of 1842, which, at the same time it conferred upon courts, not of general but of limited jurisdiction,

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new, special, limited authority, likewise gave the right of appealing to the county court "for a rehearing and *final decision.*"

Another objection urged by the appellant's counsel against the motion to dismiss is, that the case is not within the jurisdiction of the orphans court under the act of 1842 or under any other act, and consequently the appeal to this court was properly taken. But we cannot yield our assent to this. The statute is very broad in its terms, giving authority to hear and *determine* all matters in dispute between masters and apprentices; to release apprentices previously bound; to rebind apprentices that may be released for cause or *otherwise;* and to do all other acts in relation to masters and apprentices that could be done by the county courts. This does not simply confer upon the orphans courts the same power which the county courts had, but is more general and comprehensive. The act giving jurisdiction to the latter courts, directs the proceeding to commence by petition, but the law of 1842 does not prescribe any particular mode of proceeding, and if, without the apprentice being made formally a party, the orphans court think proper, upon the suggestion, in writing, by counsel, to require the master to show cause why the apprentice should not be released, and after the examination of proof, *pro and con*, they decide the case by releasing the apprentice and rebinding him, they are not acting beyond the limits of their jurisdiction.

Appeal dismissed.

Albert Case *vs.* Peter McGee.

The proceedings of a county court in Virginia, directing a will to be recorded and granting certificate to the executor to obtain probate thereof, are *judicial acts* to be authenticated under the act of Congress of 1790, ch. 38, and a copy of the will, in a transcript of such proceedings so authenticated, is admissible in evidence in the courts of this State.

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Case vs. McGee.

A certificate of the clerk, certifying that "the foregoing is a true transcript from the records of the court" of which he was clerk, is sufficient, it being a *substantial compliance* with the act of Congress.

APPEAL from the Circuit Court for Frederick county.

Trover, by the appellant against the appellee, to recover the value of a negro slave bequeathed to the plaintiff by the will of Mary Ann Case, of Warren county, Virginia. Pleas, *non cul.* and limitations.

Exception. The plaintiff offered to read to the jury a copy of the will of Mary Ann Case, contained in a transcript from Warren county, Virginia, embracing said copy and the following proceedings of the county court of said county thereon, admitting it to probate and ordering it to be recorded:

"At a court held for the county of Warren, on Thursday, the 24th day of December 1840, the last will and testament of Mary Ann Case, deceased, with a codicil thereto attached, was produced in court and proved by the oaths of Daniel Cloud and Shelton Grinly, witnesses thereto, and ordered to be recorded; and on motion, Christian Hartman, the executor named in the said will, who was sworn and entered into bond, with Daniel Cloud and Joseph S. Springle, his securities, in the penalty of four thousand dollars, conditioned according to law, certificate is granted him for obtaining probat of said will in due form of law.

Teste,—ROBERT TURNER, C. W. C."

To this was annexed the following certificate of the clerk of said county, with the seal of the court attached:

"*State of Virginia, Warren county, to wit:*

I, Robert Turner, clerk of the county court of Warren, in the State of Virginia, do hereby certify, that the foregoing is a true transcript from the records of the said court.

In testimony whereof, I hereunto set my hand and
(L. S.) annex the seal of the said court, this sixth day of
November 1854. ROBERT TURNER."

There was also a certificate of the presiding justice of said county court, "that Robert Turner, who hath given the preceding certificate, is clerk of the said court, and that his said attestation is in due form."

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The defendant objected to the reading of the copy, on the ground that it was not sufficiently authenticated, which objection the court, (NELSON, J.,) sustained, and refused to let the will be read to the jury. To this ruling the plaintiff excepted, and the verdict and judgment being in favor of the defendant, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

Joseph M. Palmer for the appellant, argued:

1st. That the copy of the will in question was admissible, the attestation and certificate thereof being in strict accordance with the requirements of the act of Congress of 1790, ch. 38. It was recorded by order of the county court of Warren county, in the State of Virginia, and probate granted, as appears by the attestation of the clerk of said court and the seal of the court annexed, and the certificate of the presiding justice that the attestation of the clerk is in due form. It is difficult to conjecture upon what principle the court below refused to suffer this transcript to be read in evidence, for even admitting it is not attested and certified, as required by the act of Congress, it was certainly admissible under the provisions of the act of Assembly of this State of 1785, ch. 46, sec. 2, which makes the record evidence without the certificate of the presiding justice. It is well settled, that the method of authentication of public documents under the act of Congress of 1790, ch. 38, is not to be considered exclusive of any other method of authentication which the States may think proper to adopt. 12 *Serg. & Rawle*, 203, *Kean vs. Rice*. 1 *Chipman*, 303, *State vs. Slade*. 3 *Pick.*, 293, *Raynham vs. Canton*. 6 *Binney*, 321, *Biddis vs. James*. 3 *Leigh*, 816, *Ex-parte Povall*, which is a case directly in point. 1 *Greenlf. on Ev.*, *secs.* 489, 504, 505, 506, 519. In 4 *Philip Ev., by Cowen & Hill, note* 144, all the cases on the subject of the construction of the act of 1790 are referred to.

2nd. The proceedings of *probate* courts, and all courts having jurisdiction in cases of wills or testaments, may be proved

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and authenticated in the manner directed by the act of Congress of 1790, and when so authenticated they are admissible in evidence. 1 *Peters' C. C. Rep.*, 352, *Craig vs. Brown.* 8 *Yerger*, 142, *Hunt vs. Lyle.* 2 *A. K. Marshall*, 290, *Barbour vs. Watts.* 1 *Rawle*, 386, *Ripple vs. Ripple.* This last case is very much like the one under consideration. It was a will attested by the clerk of the county court of Jefferson county, Virginia, with the certificate of the presiding justice of said court, as in this case. The *transcript* of the proceedings of the county court in this case is authenticated in due form of law. 2 *English*, 369, *Butler vs. Owen.* 7 *Cranch*, 408, *Ferguson vs. Harwood.* 13 *Serg. & Rawle*, 135, *Edmiston vs. Schwartz.* 1 *Greenlf. on Ev., sec.* 505. Every legal intendment is to be made in favor of the proceedings of the county court of Virginia, and every thing is presumed to be rightfully and properly done until the contrary is shown. 5 *G. & J.*, 500, *Wernwag vs. Pawling.* 7 *Do.*, 434, *Brengle vs. McClellan.* 2 *H. & J.*, 41, *McMechen vs. Mayor & City Council of Balto.* The record and proceedings in this case are to have such faith and credit given to them as they have by law and usage in the courts of Virginia. This is a principle well settled, upon the true construction of the act of Congress of 1790. 13 *Pet.*, 312, *M'Elmoyle vs. Cohen.* 3 *Wheat.*, 234, *Hampton vs. M'Connel.* 7 *Cranch*, 481, *Mills vs. Duryee.* 7 *Gill*, 418, *Bank of U. S. vs. Merchants Bank.* 1 *How.*, 290, *Williams vs. United States.* 2 *Iredell*, 346, *State vs. Patterson.* In 2 *Iredell*, 440, *Lee vs. Gause*, "a certificate of the clerk of the court, that the annexed papers were correct transcripts of the original proceedings, and of the presiding judge, that the attestation was in due form, was held to be a sufficient authentication in North Carolina." And as the record in question is one transcribed from office books *appertaining to a court*, the authentication under the act of Congress of 1790 is correct.

Wm. P. Maulsby for the appellee, argued:

That this is not a record or judicial proceeding of a court of the State of Virginia, but a record kept in a public office not

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appertaining to a court, and therefore to be authenticated by the attestation of the keeper and the seal of his office thereto annexed, with a certificate of the presiding justice of the county court of the county in which the office is kept, and *further*, by the certificate of the clerk of said court that the said presiding justice is duly commissioned and qualified, as required by the act of Congress of 1804, ch. 56. In this case the latter certificate is omitted.

The will is not authenticated according to our act of 1785, ch. 46. There is no evidence that the laws of Virginia require this will to be *recorded*, for those laws are not in evidence in this case. The case cited from 1 *Rawle*, is one relating to the sufficiency of the *probate* of the will, whereas the question here is as to the sufficiency of the *authentication;* in that case there was no question made as to the mode of authentication.

The act of Congress of 1790 applies to one species of evidence and the act of 1804 to another. Now to which species or class does this evidence belong? The act of 1790 relates to the *records and judicial proceedings* of the courts of the several States. The evidence here *sought to be offered* is a *copy of the will*, and not the *judicial proceedings* of the court of Warren county—not the *judgment of that court*.

It does not appear that the clerk of Warren county has the power to record wills, or that the county court has custody of the records so as to grant exemplifications. The certificate in this case is not that the copy of the will in the record is a *true copy* extracted from the records. It merely certifies that the *aforegoing;* that is, the *judgment* ordering probate and record, and *not the will*, is a *true* transcript of the proceedings of said court. The certificate therefore is not in the proper form. 1 *Ev. Har.*, 23, 24, *notes*.

Now what papers does the act of 1804 contemplate as appertaining to courts? If a will appertains to the proceedings of the orphans court, then a *deed* appertains to the proceedings of the county courts. The fact that the keeper of the records is the clerk of the court, cannot make papers kept and recorded by him pertain to the *judicial proceedings* of the court in contemplation of the act of Congress.

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MASON, J., delivered the opinion of this court.

The only question involved in this record is, whether the transcript of the will of Mary Ann Case, and the proceedings thereupon, in Warren county court, Virginia, were properly and duly authenticated, so as to make them admissible evidence in the courts of Maryland: and this involves the further inquiry, whether they are "records and judicial proceedings" *of a court* within the meaning of the act of Congress, passed May 26th, 1790, relating to the authentication of public records? &c.

The probate and recordation of this will, as appears from the certificate, are themselves *judicial acts*. The will being the foundation or basis of the whole proceeding must be treated as part of the proceedings themselves, and is therefore properly authenticated under the act of 1790.

The act of 1790 rests upon the assumption that a proceeding of a court of a different State, if authenticated according to that act, is warranted by, and in accordance with, the laws of that State, and from this proceeding it appears, that probate and recordation of the will are both necessary to give it vitality. Therefore we are to assume that a mere authenticated copy of a will, without any thing more, would not be sufficient, because it would not therefrom appear to have been admitted to probate and record in due course of law by the proper tribunal. Without these legal attributes it could not have had the effect of a valid will in Virginia, and therefore, when authenticated without these acts appearing to have been done, could not have any legal effect in this State. These acts being *judicial proceedings*, could only be authenticated in the manner pointed out by the act of 1790. 1 *Rawle's Rep.*, 386.

The paper offered in evidence in this case, as appears from its face, is not a mere *exemplification of a record or office book, not appertaining to a court*, within the meaning of the act of Congress of March 29th, 1804. As has already been said, but for the judicial action of the court, this will would not have been a part of the records or proceedings of the court, and therefore not embraced within that act, which relates to the authentication of papers which are admitted to record as a matter of course, and not in virtue of any judicial mandate.

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It has been said that the certificate of the clerk of Warren county court, is not full and specific enough to gratify the act of 1790. Though it may not have been, strictly speaking, a literal compliance with the law in this particular, nevertheless we think it a *substantial compliance*, which is sufficient. *Washington vs. Hodgskin*, 12 *Gill & Johns.*, 356. *Warner vs. Hardy*, 6 *Md. Rep.*, 525.

Judgment reversed and procedendo awarded.

Caspar Welty and wife, *vs.* Joseph Welty, Exc'r of Susanna Hornaker.

The two first witnesses to a will *forty years old*, containing the usual attestation clause and purporting to be signed by the testator, were dead, but their signatures were proved, and also that they were *men of integrity and business habits*. The third and surviving witness proved his signature; that he was requested by the testator "*to come over and put his name to his will;*" that he accordingly signed a paper in presence of the testator and one of the other witnesses, and never signed any other paper for him or at his request; but did not sign in the presence of the other witnesses, nor did the testator sign the will in his presence, nor does he recollect that the three witnesses were at any one time all present when the testator acknowledged the paper to be his will. Held:

That this will was properly admitted to probate, though there was no proof of the signature of the testator thereto.

The law looks with lenity upon the failure of the memory of witnesses to *ancient wills*.

It is not necessary that the witnesses to a will should sign it in the presence of each other, nor need they see the testator actually sign, nor need he acknowledge his signature to all the witnesses at the same time; the acknowledgment may be made to each witness separately.

Appeal from the Orphans Court of Frederick county.

This was a *caveat* to the will of Peter Hornaker, executed on the 13th of April 1813 and offered for probate on the 23rd of April 1855, filed by the appellants, as heirs at law, upon the following grounds:

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1st. Because the paper was not signed by the testator or by any other person in his presence, or by his express directions.

2nd. Because it was not attested and subscribed in the presence of the testator by three or four credible witnesses, or by the persons whose names are subscribed as witnesses thereto.

3rd. Because said persons whose names are subscribed as witnesses did not attest said will in the presence of each other.

The sanity of the testator at the time of the execution of this will was admitted, and the appellee, the executor of the devisee under the will, having answered the *caveat*, testimony was taken, which is fully stated in the opinion of this court, and the orphans court ordered the will to be admitted to probate. From this order the caveators appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

Wm. P. Maulsby for the appellants, argued, that there was no sufficient proof that the requirements of the act of 1798, ch. 101, sub-ch. 1, sec. 4, have been complied with. These requirements must be proved either by positive evidence of the subscribing witnesses themselves, if living and within reach of the process of the court, or if they be dead, by such facts and circumstances as will enable the court or jury to find the facts. In the latter case, among the facts to be proved must be the handwriting of the testator and that of the subscribing witnesses. In the former case, one of the subscribing witnesses is sufficient to be produced, provided he can prove that all the requirements of the statute had been complied with. 2 *Selw. N. P.*, 89. 19 *Johns.*, 386, *Jackson vs. Le Grange*. 1 *Wend.*, 406, *Jackson vs. Vickory*. 11 *Wend.*, 599, *Fetherly vs. Waggoner*. The learned counsel then insisted upon the following points:

1st. There is no proof that this will was signed by the testator, or any person by his direction, at the time the witness produced signed it. The witness to a will must see the testator actually sign, or his signature must appear to the will at the time of attestation and be acknowledged by him. 1 *Jar-*

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man on Wills, 115, 116, 117, and cases there referred to. It must appear from the proof that the paper was *signed* by the devisor, and so signed, was *attested* by the witnesses. 7 *Eng. Eccl. Rep.*, 340, *In re. Harrison.* In this case the witness proves, that the paper was *not* signed by the testator in his presence, and fails to prove that it was produced to him by the testator *as his will*, and that his name was signed to it when witness subscribed it, and by consequence, any acknowledgment by the testator of his signature. This is a much stronger case than those cited above from New York, where the witness had forgotten the circumstances, and room was left for all necessary inferences from the fact, that the signature of the witness was proved, and the circumstance that the witness was familiar with the requisites of the law to the valid execution of wills, and would not probably have subscribed the paper unless those requisites had been gratified. See also on this point 5 *Philips on Ev.*, (*New Ed.*,) 447. 2 *Littell*, 137, *Gwinn vs. Radford.* 3 *Leigh*, 443, *Dudleys vs. Dudleys.* 1 *Dana*, 162, *Carrico vs. Neal.* 1 *Molloy*, 31, *Holton vs. Lloyd*, and cases cited in notes 12, 13, 14 to appendix in *3rd Ed. of Philip on Ev.* It must appear by production of witnesses that the testator *signed the will*, and proof of handwriting will not do. 7 *Eng. Eccl. Rep.*, 509, *Blake vs. Knight. Ibid.*, 517, *Keigwin vs. Keigwin.*

2nd. There is no proof this paper was attested and subscribed by three or four credible witnesses. The case of witnesses attesting at different times is supported by so many authorities, that it may be considered as settled; yet, says Sir John Strange, in the case of *Ellis vs. Smith*, 1 *Ves., Jr.*, 14, "I think it is a dangerous determination, and destructive of those barriers which the statute has erected against fraudulent perjuries." Whilst a will may be attested by the witnesses separately, yet there must be *affirmative proof* that they did so attest, (5 *Philip on Ev.*, 449,) and that the paper was attested and subscribed in the presence of the devisor, or there is yet a further destruction of those barriers. The attestation clause is not evidence. It is only evidence to go to the jury in connection with other facts and circumstances, from which the jury

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may find the fact of the attestation and subscription in the presence of the devisor. 1 *Selw. N. P.*, 89. 19 *Johns.*, 386, and other cases cited under the first point; and also the Maryland cases: 1 *H. & J.*, 1, *Collins vs. Elliott.* *Ibid.*, 399, *Collins vs. Nicols.* 4 *H. & J.*, 241, *Miller vs. Honey.*

3rd. Proof of the handwriting of a deceased witness is only admitted on the ground, that it is the best evidence which can be produced. If a witness be living he must be called; and to establish the will, he must prove that all the requisites of the statute have been complied with, or he must prove facts and circumstances from which the jury may so find. Where the witnesses are all dead, it is left to the jury to decide from circumstances merely, without any positive proof, whether the witnesses set their names in the presence of the testator. 2 *Comyn's Rep.*, 531, *Hands vs. James.* In this case no single circumstance is proved to assist an inference from the naked fact of the handwriting of the deceased witnesses. They may have subscribed separately. In this case they must have done so, if at all. It is proved they did *not* subscribe in the presence of each other, as is alleged in the attestation clause. There is no proof that they did subscribe separately. None that they subscribed in the presence of the testator. Welty and Motter may have done so, but positively Hughes did not. If it may be inferred that Welty and Motter did subscribe in the presence of the testator, the same proof is positive that the testator did *not sign* in their presence and did *not acknowledge* the signature as his. The proof also fails to show that there was any signature at all of the testator to the paper when it was subscribed by the witness, or that it was at any time within his knowledge placed to it. The *onus* is on the party offering the will for probate. He cannot claim the benefit of an inference, from the single fact of the handwriting of the dead witnesses that the requirements of the statute have been gratified, in opposition to the positive proof of the living witness that they have not. Nor can he be entitled to a presumption that every thing made necessary by the statute has been done, when, having produced the living witness, he omits or fails to prove that every necessary thing was done, especially when

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the deficiency of proof is not even alleged to have proceeded from the failure of the witness' recollection. Again, there is no sufficient proof of the handwriting of the testator to this paper. The witness, Hardman, says, he has seen the testator write, and "to the best of *my impression* it is his handwriting." He does not swear to his *belief* that it is his handwriting, and nothing short of this will suffice. The law recognises no such term as *impression*. 1 *Greenlf. on Ev., sec.* 576.

Grayson Eichelberger for the appellee, stated, that the act of 1798, ch. 101, sub-ch. 1, sec. 4, is a transcript of the statute 29 Charles 2, ch. 3, sec. 5; and the English rule of construction of the statute of frauds in the execution of wills, applies in those States which have followed the language of the statute. 4 *Kent's Com.*, 516. And then argued:

1st. That the witnesses to a will need not attest it in the presence of each other. 4 *Kent's Com.*, 516. *Roberts on Frauds*, 432. 1 *Greenlf. on Ev., sec.* 272. 1 *Jarman on Wills*, 72, *note* 2. 2 *Starkie on Ev.*, (6*th Ed.*,) 918. 2 *Selw. N. P.*, 83.

2nd. The testator need not sign the will in the presence of the attesting witnesses. An acknowledgment by him of his signature or that it is his will, is equivalent to signing and is sufficient. *Roberts on Frauds*, 309, 392. 1 *Greenlf. on Ev., sec.* 272. 2 *Greenlf. on Ev., secs.* 675, 676, 677. 1 *Jarman on Wills*, 71, 72, 73, *and note* 1, and cases there cited. 2 *Starkie's Ev.*, 1262, *note* 1. *Lovelass on Wills*, 299. *Modern Probate of Wills*, 166, 167, 170, 177, 179. 3 *Leigh*, 436, *Dudleys vs. Dudleys.* 1 *Philip on Ev., (old Ed.,)* 481. 1 *Ves., Jr.*, 11, *Ellis vs. Smith.* 17 *Pick*, 373, 379, *Hall vs. Hall.* 1 *Metcalf*, 349, 352, *Dewey vs. Dewey.*

3rd. Where the witness is dead, on proof of signature attestation in presence of the testator will be presumed, as also the other requisites of the statute. 1 *Jarman on Wills*, 74, *(marg.,)* 218, 219, 220, *(top.)* *Roberts on Frauds*, 413, 414. 1 *Philip on Ev.*, 483, 484. 2 *Selw. N. P.*, 85, 89. *Lovelass on Wills*, 417, 418. *Comyn's Rep.*, 530, *Hands vs. James.* 2 *Strange*, 1109, *Croft vs. Pawlet.* 1 *Wend.*,

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406, *Jackson vs. Vickory.* 6 *Bing.*, 310, *White vs. British Museum.* 7 *Bing.*, 457, *Wright vs. Wright.* 2 *Greenlf. on Ev., sec.* 677. *Best on Presumptions*, 66. *Modern Probate of Wills*, 196, 197, 491. 2 *Littell*, 137, *Gwinn vs. Radford.* 26 *Wend.*, 325, 338, *Remson vs. Brinkerhoff.* 2 *Barb. Ch. Rep.*, 40, 56, 57, 58, 59, 60. 1 *Crompton & Meeson*, 140, *Johnson vs. Johnson.* 2 *Starkie's Ev.*, 920, 923. 3 *Lomax Digest*, 51. 19 *Johns.*, 388, *Jackson vs. Le Grange.* The cases cited from *7th Eng. Eccl. Rep.*, by the counsel upon the other side, rest upon the distinction between the statute of *Charles* and *Victoria*, the latter requiring the *acknowledgment of the signature*, and consequently do not apply to this case. Again, this is a will more than *forty years old*, and where such great length of time has elapsed since the execution and the memory of the attesting witnesses fail, less strict proof is required. *Modern Probate of Wills*, 456, *et seq.* 1 *Greenlf. on Ev., sec.* 21.

Eccleston, J., delivered the opinion of this court.

In the year 1855, a paper purporting to be the last will and testament of Peter Hornaker, bearing date the 13th of April 1813, was exhibited for probate in the orphans court of Frederick county, to which the appellants filed a caveat. The attestation clause is in the usual form, and appears to have been signed by three witnesses, in the following order:

"*Lewis Motter.—Joseph Hughes.—Abraham Welty.*"

The first two being dead their signatures were proved to be genuine. And in reply to a question propounded in relation to their standing as men of business and of integrity, a witness answered, "I was personally acquainted with the said Motter and Hughes. Motter was a very competent business man, none more so in the country. Hughes was rather out of business when I knew him; his general reputation was that of an active business man, and both men of integrity."

Abraham Welty was called and examined. He proved his own signature. Being asked whether he signed the paper at the request of Peter Hornaker, what Hornaker then said, whether at the time he (the witness) signed the will Hornaker

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was present, and who else was then present, he says, "I was in the street and Peter Hornaker requested me to come over and put my name to his will; he was present. Mr. Motter must have been in when I was." To the best of his knowledge this witness never witnessed any other paper for Hornaker or at his request.

On cross-examination Welty says he might have seen Hornaker sign his name to the paper, but to the best of his recollection he did not. He has no recollection that Hornaker did sign it in his presence, or where he might have seen him.

To the best of Welty's knowledge when he signed his name Hornaker and Motter were both present, but he says he does not know whether Motter signed his name to the paper or not. Hughes was not present. In another part of his cross-examination this witness testifies that Motter was present but he did not see him sign his name; that Hughes was not there and did not sign in his presence. He has no recollection that himself, Motter and Hughes were at any one time all present with Hornaker when he acknowledged the paper to be his last will and testament.

In response to an interrogatory on the part of the appellee, Welty answered, "I do not mean to say that Lewis Motter did not sign his name to said paper in my presence—I only mean to say that I have no recollection of seeing him sign his name to said paper. From the lapse of time I have no recollection on the subject."

For the purpose of proving the signature of Peter Hornaker, Philip Hardman was examined as a witness, who said, "I have seen him write, to the best of my impression it is his handwriting." This testimony has been objected to as inadmissible to prove the signature. Whether the objection is valid or not, it is unnecessary to decide, because we think without it the other circumstances disclosed in the record are sufficient to sustain the decision of the orphans court, admitting the will to probate. The case will therefore be treated as if Hardman's testimony was not in it.

The paper in dispute being over forty years old at the time of the trial, is a very important fact, having considerable influ-

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ence upon our decision, and the views expressed in this opinion are to be considered as having particular reference to such a paper. Whether a will of recent date, if supported by such testimony as the present, would be admitted to probate, is not now a question to be decided.

The law is based upon reason and does not exact impossibilities. Rules of evidence which apply to some transactions of recent occurrence, are very much relaxed when transactions of a like character, but of very ancient date, come under consideration. The frailty of the memory of man renders this essentially necessary, for without such relaxation gross injustice would frequently be the inevitable result. That the law looks with lenity upon the failure of the memory of witnesses to ancient wills, may be seen by reference to *Lovelass on Wills*, 418, and the authorities there cited in the notes, (25 *Law Lib.*, 224,) 19 *John. Rep.*, 389. 1 *Wend. Rep.*, 414.

The witnesses, it appears, did not sign this will in the presence of each other; nor was it necessary that they should, according to the English decisions, under the statute of 29 Charles 2nd, ch. 3, sec. 5, of which our act of 1798, ch. 101, sub-ch. 1, sec. 4, is a copy.

The cases cited by the appellants' counsel from 7 *Eng. Eccle. Rep.*, are decisions upon the statute of 1 *Vic., ch.* 26, which differs materially from that of Charles 2nd. But speaking of decisions under the last named statute, on pages 416 and 417 of 7 *Eccl. Rep.*, Sir Herbert Jenner Fust says: "It was held not necessary that the witnesses should see the testator actually sign; he need not acknowledge his signature to all the witnesses at the same time, the acknowledgment might be made to each witness separately; a simultaneous presence of the witnesses was not required." He then refers to several cases as having determined that an acknowledgment in the presence of each witness separately is sufficient. Other cases are cited by him as showing that a request to witnesses to subscribe their names as witnesses, without stating what the instrument was, was a sufficient acknowledgment under the statute of Charles. And again he says, on page 417: "Under the statute of frauds it was sufficient if the paper was acknowledged

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to be a will, but it is now enacted in express terms that the signature shall be acknowledged, it would seem to require that the witnesses should see the signature; that they should know that the paper was signed at the time, a fact which could only be known by seeing the testator sign, or by hearing him say that he had signed, and that was his signature." The subject of a testator's acknowledgment of the will, in the presence of the witnesses, is further treated of in the same case, on pages 419, 420.

In *Hand vs. James, Comyn's Rep.*, 531, the three witnesses to the will being all dead, the court held, that they having set their names to the paper it must be intended they did it regularly. And as one of them was an attorney of good character he might be presumed to understand what ought to be done, rather than the contrary.

Considering a portion of the opinion of Judge Cabell, in *Dudleys vs. Dudleys*, 3 *Leigh's Rep.*, 442, 443, so properly applicable to the case of this old will, we are induced to make a long quotation from it. He says: "Now the writing in controversy purports to be the will of Gwin Dudley, and his name is signed to it as testator; and Hendrick deposes, that this very paper was acknowledged by Dudley, and that he subscribed his name, as a witness, in his presence. It is true he does not expressly say that Dudley's name was or was not signed to the will at the time it was acknowledged. But it is not usual for men to acknowledge papers, either as deeds or wills, and to call on others to attest them before they are signed. Such a thing may happen, and when it is proved to have happened, the acknowledgment and attestation will be disregarded. But, in the absence of all proof to the contrary, the acknowledgment and attestation give rise to an irresistible inference, that the instrument had been previously signed. A contrary course would defeat a vast number of deeds and wills; for it may often happen, and frequently does happen, that a witness not only does not remember to have seen the signature, but he does not remember the acknowledgment or the attestation, but when he sees his name subscribed by himself, as a witness, and knows that he would not have witnessed a blank

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or unacknowledged paper, he feels no more doubt of the due execution of the paper than if he distinctly recollected all the circumstances. We must take it, therefore, that this will was signed when it was acknowledged before the witness *Hendrick*. That acknowledgment is proof, *prima facie*, that it was signed by the testator himself. But if the signature was, in fact, by some other person, then the acknowledgment is a ratification of the signature, and from that ratification we may fairly infer, that the signature was made in his presence and by his direction." And in the same case, at page 449, the President Judge (Tucker) gives the like effect to the testimony of the same witness, by saying: "For *Hendrick* says the paper produced at the trial was that which was acknowledged, and we must therefore presume it was signed as we see it, in the absence of proof to the contrary."

In the case before us there is not a particle of proof which suggests the slightest suspicion of any unfairness in regard to the will. And the sanity of the testator is admitted.

We have seen that the two witnesses who signed first are both dead, and their signatures are proved to be genuine. They were men of integrity, having business habits, and the first of the two very remarkable as a man of business. In the absence of proof to the contrary, these circumstances, in such a case as this, justify the legal presumption that the requisites of the law have been complied with, so far as relates to the execution of the will in the presence of those witnesses, when that presumption is supported by the testimony of the surviving witness. And here we think it is. This witness being in the street was requested by the testator to come over and put his name to his *will*. The name of the witness was put to a paper in the presence of the testator, and Motter, a very intelligent man of business, whose name (proved to be genuine) appears first upon the instrument as a witness; Welty, the surviving witness, never having signed any other paper for the testator or at his request. The paper in dispute has upon it the genuine signature of Welty as a witness, his name being last in the order of signing. From such facts how can we come to any other conclusion than that the will which the

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testator requested the witness to put his name to is the paper in controversy? And if it is there was an acknowledgment of this paper as his will by the testator to the witness; which acknowledgment having been made, when, from the face of the paper itself, in connection with the testimony of Welty, it appears the two first named witnesses had previously attested it, they being men of integrity and of business habits, the legitimate inference is, that the name of the testator appearing thereon is his handwriting, or was placed there by his authority and in his presence, and was there when the paper was attested by the first witnesses. We therefore think the orphans court were right in admitting this will to probate.

The cases of *Jackson vs. Le Grange*, 19 *Johns.*, 386, and *Jackson vs. Vickory*, 1 *Wend.*, 406, were both actions of ejectment, and differ materially from this. In the first, but one witness was examined who did not prove the perfect execution of the will; one of the witnesses was dead, but the third was living, and within the jurisdiction of the court. In the other case the only witness called to testify failed to prove that the requirements of the law had been complied with, and the other two witnesses were alive and within the court's jurisdiction.

Order affirmed.

Henry Warner *vs.* Richard Fowler.

The act of 1729, ch. 20, in so far as it permits a party to prove his own accounts by oath or affirmation, is in derogation of the common law, and like all such legislation, is to be construed *strictly*.

An account sworn to under this act, must show *affirmatively* upon its face that it was made "*within twelve months after the first article therein charged shall become due*," or else the oath is *extra-judicial*, and cannot constitute *perjury* if false.

The 15th sec. of the act of 1729, ch. 20, making it perjury to swear falsely to "*any account*," before any justice, is *repealed* by the 8th sec. of the act of 1785, ch. 46.

Appeal from the Circuit Court for Carroll county.

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This was an action of *slander*, by the appellant against the appellee. The words charged in the declaration to have been spoken by Fowler of Warner are: "He swore to a lie and I can prove it;" "He swore false;" "He swore to an account which he trumped up against me which was false and untrue, and I want every body to know that he swore to a damned lie;" innuendo that Warner was guilty of wilful and corrupt perjury. The declaration, in its introductory averments and colloquium, states, that whilst an action of debt was depending before Jacob Myerly, a justice of the peace for Carroll county, between Fowler, as plaintiff, and Warner, as defendant, on an open account for less than fifty dollars, Warner made an affidavit or affirmation before Jesse Manning, another justice of the peace for said county, to an account in his own favor against Fowler, "said account not exceeding ten pounds, current money, in any whole year, and having been proved as aforesaid within twelve months after some of the articles therein charged had become due," and filed and plead this account so proved in bar or discount of the aforesaid claim against him by Fowler, the said account so filed being material and pertinent to the issues joined in the trial of said action, and the said affirmation being in proof of said account in said trial. The declaration then charges, that the words complained of were spoken by Fowler of Warner in reference to this affidavit or affirmation. The plea was *non cul.*

1*st Exception.* The plaintiff proved the speaking of the words substantially as laid in the declaration. He then offered in evidence the following account and affirmation thereto:

"*Richard Fowler to Henry Warner, Dr.*

1850.	To the hire of my wagon, - - - -	$1 00
	To pasturage for cows, - - - - -	6 00
	To cash lent him, - - - - - -	1 50
	To hauling him and family to camp-meeting,	2 00
	To 17 lbs. flour, at 3¼ cts., - -	55¼
	To 10 lbs. of bacon, " 8 cts., - -	80
		$11 85¼
	To 1 doz. eggs, - - - - - -	12½
		$11 97¾

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Carroll County, to wit: On this 7th day of January 1851, before me, the subscriber, a justice of the peace in and for said county, personally Henry Warner, who solemnly, sincerely and truly declared and affirmed that the above account is just and true, and that he hath not, directly or indirectly, received, to his knowledge, any part of the money charged due, or any security or satisfaction for the same, except an account in bar.

Sworn before JESSE MANNING."

He further offered in evidence the judgment of the justice, *(Myerly,)* in the case against him by Fowler, which was in favor of the defendant, for $1.60, debt, and each party to pay his own costs; and proved that in the trial of this case, the account against Fowler, with the affirmation thereto annexed, was produced in evidence, and plead and offered in bar by Warner to the claim of Fowler against him. The claim upon which Fowler sued amounted to $7.48. The plaintiff then rested his case.

The defendant then asked the court to instruct the jury, that upon the pleadings and evidence, the plaintiff is not entitled to recover for the following reasons: 1st, because the declaration does not set out a good and sufficient cause of action; 2nd, because the evidence is not legally sufficient to warrant the jury in finding all the material and necessary allegations in the declaration.

Upon these prayers the court, (NELSON, J.,) instructed the jury, that the plaintiff was not entitled to recover, because the account proved to be the paper referred to in the declaration, and in speaking the words charged to have been spoken by the defendant, was not such a paper or account as the party making the affirmation could legally affirm to, under the act of Assembly authorising a party to swear to his account, because there was no date upon the paper to show affirmatively that the affirmation was made within one year after the account accrued due, according to said act of Assembly, that therefore said affirmation not having been made within the time prescribed by said act, the affirmation was extra-judicial, and the party making the same cannot be guilty of perjury. To the instruction so given the plaintiff excepted.

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2nd Exception. The plaintiff then offered further evidence, that in 1849 or 1850, Fowler had used the wagon of the plaintiff, but the witness could not fix the precise date. He then offered in evidence the account upon which Fowler sued, dated in 1850, for the purpose of proving that Fowler, at the time of the affirmation by Warner was made, was indebted to the plaintiff, as charged in the account affirmed to. The plaintiff then prayed the court to instruct the jury, that if they believe all the evidence in the case, the plaintiff is entitled to recover; which prayer the court refused to grant and instructed the jury, that upon the pleadings and all the evidence in the cause, the plaintiff is not entitled to recover for the reasons assigned in the instruction first given. To this ruling the plaintiff excepted, and the verdict and judgment being against him, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

James Raymond for the appellant, argued, that the swearing or affirming to an account by the creditor of a less sum than ten pounds, current money, is an oath or affirmation *in the course of a judicial proceeding*, and if false is perjury. The act of 1729, ch. 20, sec. 11, says, that the accounts shall be proved within twelve months after the *first* article therein charged shall "*become due*," not after it was *charged*. The language of this section clearly refers the decision of the time within which the oath is to be made to the tribunal before whom such oath comes as *evidence*. It is not the duty of the magistrate before whom the oath *is taken* to see that the account is within twelve months. He is bound to administer the oath, and when that oath is offered in evidence, the magistrate before whom it is offered decides whether or not it is within time; and the fact that it is *rejected* as evidence, does not show that the magistrate was not *bound* to administer the *oath*. To render the charge of false swearing actionable, all that is necessary is, that the false swearing should be before "a court or magistrate having legal authority to administer an

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oath." 10 *Johns.*, 177, *Van Steenbergh vs. Kortz.* Besides this, the 15th section of the act of 1729 expressly makes it *perjury* for any person wilfully to swear or affirm falsely to "*any account* before any provincial or county justice," and in my judgment, this section is not repealed by the 8th section of the act of 1785, ch. 46. The latter act, according to my reading of it, continues in force *all the provisions* of the act of 1729, so far as accounts not exceeding ten pounds, current money, are concerned.

But again, the record shows that this affidavit was offered in evidence and *plead in bar* in the *trial* before the magistrate, and having been received, though illegally received, it stands in the same position as a witness who has been erroneously admitted to testify, though not a competent witness, in which case it is *perjury* if he swears *falsely*, because his oath was received and used. 10 *Ohio*, 220, *Montgomery vs. The State.* 26 *Maine*, 33, *State vs. Keene.* 2 *Russell on Crimes*, 598 to 603.

There can be no objection to the *form* of this affidavit, for it is clearly within the act; the words, "*except an account in bar*," gratify the provision, "*more than credit shall be given for.*" Similar language in the act of 1798, ch. 101, sub-ch. 9, sec. 8, "*except what, if any, is credited,*" has always been construed to mean "*except an account in bar.*"

William P. Maulsby for the appellee, argued, that to constitute *perjury*, the oath or affirmation must be falsely taken in a judicial proceeding before a "*competent jurisdiction*, and it must also be *material* to the question depending." *Arch. Cr. Pl.*, 672. The only question then is, what is the construction of this act of 1729, ch. 20? But for this act, no man's oath in his own favor could be allowed; it is, therefore, an act to be *strictly construed*, being in *derogation of the common law* in allowing a party to be a witness in his own case. Now by this act, the oath must be administered *within twelve months* after the first article therein *charged becomes due*, and *then* the account is made evidence, and *not otherwise.* The oath then is *only* authorised when the account appears upon

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its face to have its *first article* charged *within twelve months*. If not *thus made*, it cannot be evidence; and not being evidence, it cannot be *material* to the question depending. The party cannot resort to evidence *dehors* his affidavit to show that it was made within the time required by law. The act creates one *entire* and simple piece of evidence which must be complete in all its parts, and it cannot be thus complete unless it appears upon its face to be made *within time*.

It nowhere appears from the record that this affirmation was admitted and received by the magistrate *as evidence*. The record merely states that it was *offered and plead in bar*. Again, the affirmation must be in strict conformity with the act. There is no proof here that the party making it was a *quaker*, and therefore the affirmation does not come within the law. The 15th section of the act of 1729 is, in my judgment, expressly *repealed* by the 8th section of the act of 1785, ch. 46.

Le Grand, C. J., delivered the opinion of this court.

Waiving all question as to the alleged generality, under the act of 1825, ch. 117, of the several prayers to be found in the record, we are of opinion, that the instruction actually given by the judge of the circuit court was substantially correct. The act of Assembly under which the affirmation was made is one, *in this particular*, in derogation of the course of the common law, and like all such legislation, is to be construed *strictly*. See *Dyson vs. West's Exc'r*, 1 *Har. & John.*, 567. According to the principles of the common law, a party is denied the right of being a witness in his own case; and under our act of Assembly, he is only allowed the privilege if his account does "*not exceed ten pounds, current money, in the course of any whole year*," and if it "*be proved within twelve months after the first article therein charged shall become due, and not otherwise.*" The account in this case ought, in our judgment, to show *affirmatively* on its face a compliance with the requisitions of the act of Assembly. This not being so, there was no right in the party to make the affirmation, and as a consequence, it was *extra-judicial*. In addition to this it should be recollected, that the 15th section of the act of 1729,

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ch. 20, is *repealed* by the 8th section of the act of 1785, ch. 46.

Judgment affirmed.

George Blessing *vs.* Jacob Hape and Peter Iler, Sen.

In the absence of any rule of court on the subject, a witness may be asked on cross-examination whether he was not at the time of trial engaged in a bitter controversy with, and did not entertain feelings of great animosity and hostility towards, the party against whom he testifies.

The situation of a witness with respect to the parties and the subject of litigation, his interest, his inclination and prejudices, and his means of obtaining knowledge of the facts, may be submitted to the jury to enable them to determine the value of his testimony.

Appeal from the Circuit Court for Frederick county.

Assumpsit upon a promissory note for $100, executed by the appellees to the appellant. Plea, *non assumpsit.*

Exception. The plaintiff having proved the execution of the note, the defendants produced a witness who proved a payment by one of the makers of $85 on account of the note. This witness was cross-examined by the plaintiff's counsel and permitted to leave the witness' stand, and other witnesses were examined. The plaintiff's counsel then stated that in cross-examining the first witness he had omitted to ask him a question which he wished to ask, and saying that he desired to continue the cross-examination, called the witness to the stand and asked him "whether he was not now engaged in a bitter controversy with the plaintiff, and whether he did not entertain feelings of great animosity and hostility towards him?" The defendants objected to the admissibllity of this evidence and to the right of the plaintiff to put this question, which objection the court, (Nelson, J.,) sustained, and refused to allow the question to be put to the witness. To this ruling the plaintiff excepted and appealed.

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The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

William P. Maulsby for the appellant, argued:

1st. That when the plaintiff once became entitled to cross-examine the witness, the right continued through all the subsequent stages of the cause. 1 *Greenlf. on Ev., sec.* 447. There is no rule which precludes a party from recalling for cross-examination a witness after it has been suspended, especially where it does not appear that an intention existed to take any undue advantage. 2 *H. & G.*, 136, *Morton vs. Beall.* And in this case the witness was recalled for the avowed purpose, without objection by either the court or the counsel for defendant. The objection was made only to the *question* when proposed.

2nd. That the question propounded was competent. The situation of the witness with respect to the parties and to the subject of litigation, his interest, motives, inclination and prejudices, are proper subjects of cross-examination. 1 *Greenlf. on Ev., secs.* 446, 447. A witness may be asked, on cross-examination, if he entertains feelings of hostility towards the party against whom he is called, and if he denies the fact, he may be contradicted by other witnesses. 1 *Greenlf. on Ev., sec.* 450.

No counsel appeared for the appellees.

TUCK, J., delivered the opinion of this court.

A much greater latitude is allowed in cross-examining witnesses than on the examination-in-chief. Rules of court are sometimes adopted by which the practice is confined to narrower limits than are allowed at common law. But, as the record in this case does not show that the question proposed by the appellant was irregular, in view of any rule of the court below, the correctness of its decision must be determined upon general principles.

We are not now to decide whether the witness, if he had answered in the negative, could have been contradicted, but merely whether the plaintiff below was properly refused per-

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mission to ask the defendant's witness if he was not, at the time of the trial, engaged in a bitter controversy with him, and did not entertain feelings of great animosity and hostility towards him.

As tests for the discovery of the truth in the trial of causes, "the situation of the witness, with respect to the parties and to the subject of litigation, his interest, his inclination and prejudices, his means of obtaining knowledge of the facts," &c., may be submitted to the jury to enable them to determine the value of his testimony. 1 *Greenlf. on Ev., secs.* 446, 450. 1 *Stark. Ev.*, 186, 190, *Ed.* 1842. In the case of *Harris vs. Tippett*, 2 *Camp.*, 637, a witness was asked, "whether he had not attempted to dissuade another witness, examined for the plaintiff, from attending the trial;" the court allowed the question to be put, but held that the plaintiff was concluded by his answer in the negative. And so where a party was indicted for stealing wheat, his counsel was allowed, on cross-examination, to ask the witness against him whether he had not been charged with robbing the prisoner, and "whether he had not afterwards said he would be revenged of him and would soon fix him in jail." Having denied both, it was ruled that his answer must be taken as to the charge of having robbed the prisoner, though he might be contradicted as to the words imputed to him. 2 *Camp.*, 638. Now, surely, if the witnesses in these cases had answered affirmatively, it would have shown a degree of prejudice and ill-will, calculated to impair the force of their evidence, and the questions could have been allowed on no other principle. Witnesses are constantly inquired of as to their relations to the party calling them, whether by blood or marriage, that the jury may weigh their evidence when rendered under the supposed influence of such relations. If the witness be asked as to his actual feeling towards the party against whom he is called, where nothing is left to inference, does not the reason that admits the testimony in the former class of cases apply with as much, if not greater, force to the latter mode of showing a bias on the mind of the witness? See also *Thomas vs. David*, 7 *C. & P.*, 350, in 32 *Eng. Com. Law Rep.*, 537.

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This question was considered in the case of *Atwood vs. Welton*, 7 *Conn.*, 66, in which it was held to be "very clear that a witness, on his cross-examination, may be questioned as to his being in a controversy with the party against whom he testifies, and whether he has not threatened to be revenged on him. If he should answer affirmatively, it would show a bias on his mind which ought to be weighed by the jury in considering his testimony. To such a witness as full belief will not be readily yielded as to one who feels no such hostility." Daggett, Justice, said, that it had always been the practice in this country, and at common law, and that in forty years' experience he had never known it to be doubted; that there was hardly a point about which there could be less doubt.

It is not for this court to say what influence the fact, if proved, ought to have had with the jury, but of the right of the appellant to have his question answered we have no doubt, and must reverse the judgment.

Judgment reversed and procedendo ordered.

Robert J. Jamison *vs.* William Chesnut and others.

A court of equity has power to vacate a deed executed by an insolvent debtor before his application for the benefit of the insolvent laws, but *not to* decree a sale of the property by a trustee of its own selection.

When such a deed is vacated, the title immediately vests under the insolvent system in the trustee in insolvency, who must make the sale and administer the assets under the direction of a court of law.

Where creditors file a bill to vacate such a deed, the insolvent trustee is a *necessary party* to the suit; and if such trustee be dead, a new one must be appointed by a court of law, under the fourth section of the act of 1805, ch. 110, before the bill is filed to which he must be made a party.

Appeal from the Equity Side of the Circuit Court for Carroll county.

The bill in this case was filed on the 8th of July 1852, by

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the appellees, creditors of Robert J. Jamison, to vacate an alleged fraudulent conveyance, executed by him to his mother, Rebecca Jamison, on the 9th of December 1845.

The bill charges, in substance, that this deed is fraudulent and void, both under the insolvent laws and the statute of 13 *Eliz., ch.* 5; that on the 23rd of June 1846, Jamison applied for the benefit of the insolvent laws, obtained a final discharge and that Thomas Barthalow was appointed his trustee, but died soon after without having discharged any of the duties of trustee and without having attempted to vacate said fraudulent deed; that the complainants were his creditors at the time he petitioned and that the property mentioned in the deed vested in said trustee under the insolvent laws, and he being dead, it will be necessary to appoint a trustee in his place to execute the trust. The prayer of the bill is, that the deed may be vacated and a trustee appointed in the place of Barthalow to execute the trust and sell the land in question, and calls for answers, but not on oath.

The deed assailed by the bill purports, in consideration of $1400 paid to the grantor by the grantee, to convey all the grantor's right and interest, as heir at law of his father, in a tract of land, containing about two hundred and sixteen acres, to Rebecca Jamison, the mother of the grantor.

After answers filed, (the allegations of which need not be stated,) a commission was issued, under which testimony was taken to sustain the charges of fraud contained in the bill. David Rephart, the principal witness for the complainants, testified, in substance, that in the fall of 1848, he had the State taxes to collect and called at the house of Robert J. Jamison, where Rebecca Jamison, his mother, resided, and inquired for Robert J. Jamison, but he was not at home; witness told her he had a tax bill against him and also one against her, and asked her how is it that Robert J. Jamison is taxed with the property in 1842 and you with it in 1846? She replied, when I married my husband I had about $2000 in money, and my husband was so much indebted that it took all my money to pay his debts, and when these Baltimoreans came on Johnson, (meaning Robert J. Jamison,) and Stevens,

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Johnson gave the farm to satisfy me for the money which I paid for his father, and now I have got my money back and I am satisfied. The said Rebecca was married to the father of Robert J. Jamison about thirty-eight or forty years before the deed was executed. There was also proof that the land mentioned in the deed was worth from $20 to $25 per acre.

There was no proof on the part of the defendants, except that several witnesses were examined for the purpose of impeaching the character of the witness, Rephart, for truth and veracity, some of whom swore they would not believe on oath in a matter in which he was interested, whilst others swore that they would believe his oath in a matter in which he was not interested.

The court, (NELSON, J.,) passed a decree vacating the deed as fraudulent and void, directing the land mentioned in it to be sold for the benefit of creditors and appointing a trustee to make such sale. From this decree the defendant appealed.

The cause was argued before ECCLESTON, TUCK and MASON, J.

James Raymond for the appellant, argued:

1st. That the circuit court for Carroll county, *in equity*, had no jurisdiction in this case, not even to substitute a trustee in the place of the deceased trustee. This jurisdiction is expressly conferred on the county court, as *a court of law*, in which the insolvent proceedings were had, by the act of 1805, ch. 110, sec. 4.

2nd. That if the court below had jurisdiction the proceedings are still defective for want of *proper parties*, and the decree, therefore, must be reversed and the cause remanded, under the act of 1832, ch. 302. It matters not whether the deed be assailed under the insolvent laws or the statute of *Elizabeth;* for in either case the *insolvent trustee* must take charge of and administer the fund, and *he must be* a party *to the suit*. The fact that the trustee was *dead* can make no difference, for the fourth section of the act of 1805, ch. 110, expressly provides for the appointment of a new trustee in case

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of the *death* of the one first appointed. The complainants, therefore, should, before filing their bill, have applied to the *law side* of the county court to appoint a *new trustee* in the place of Barthalow, who should have been made a party to the case. The insolvent trustee, under the laws and decisions of this State, is the *only* party who can take charge of the property. The *title* is in him and he is not *before* the court. The decree directs the title of the *parties to the suit* only to be sold, and the purchaser, in the absence of the insolvent trustee, in whom alone the title is vested if the deed be set aside, would get *no title*. 5 *Gill*, 139, *Alexander vs. Ghiselin*. 1 *Md. Rep.*, 472, *Waters vs. Dashiell*. 3 *Do.*, 463, *Manahan vs. Sammon*. 3 *Green's Ch. Rep.*, 505, *Smith vs. Trenton, Delaware, Falls Co.*

3rd. The decree directs the sale to be made by the trustee appointed by it, and the fund to be administered in equity. This is in direct contravention of the insolvent laws and the decisions above cited. A court of equity has only power to set the deed aside. Its jurisdiction *stops there;* the *sale* must be made by the insolvent trustee and the fund *distributed* under the *insolvent laws*.

4th. That the facts in the case do not warrant the decree setting aside the deed for fraud.

Joseph M. Palmer for the appellees, argued:

1st. That the act of 1841, ch. 163, shuts up the case in this court so far as regards the question of *jurisdiction*, no exceptions to the jurisdiction having been filed in the court below. This law expressly enacts, that the defendant shall not be permitted in the appellate court to urge or rely upon any objection to the jurisdiction of the court below, unless it shall appear by the record that such objection was made or raised in said court. 1 *Md. Rep.*, 144, *Pierson vs. Trail*.

2nd. The creditors clearly *have the right* to file a bill to vacate a deed of their debtor as fraudulent as against them. Indeed, *until lately*, it was doubted whether any one but creditors could file such a bill, and it has been decided that the insolvent trustee may do so only because he *represents* the credi-

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tors. If the trustee *refuses* to act, or is dead, the creditors do not lose *this right*. They may still file their bill; and a court of equity once having jurisdiction of *the case*, will hold on to it until complete justice be done between the parties. Where equity once has jurisdiction for any purpose, it will carry it out for every purpose. Here the court below clearly had jurisdiction to *vacate* the deed; and having jurisdiction for this purpose, it has also the power to carry out this jurisdiction by directing a sale and appointing a *trustee* of its own to effect it. In the case of *Swan vs. Dent*, 2 *Md. Ch. Dec.*, 112, a deed of an insolvent debtor was vacated by the chancellor and the decree appointed a trustee to sell the property, though the insolvent trustee was before the court as a party to the proceedings. This equity trustee sold the property and distributed the fund in equity, and this decree and these proceedings were *affirmed* by the Court of Appeals in 7 *Gill*, 374. But suppose there is error in the decree below in this particular, this court still has the power to pass just such a *decree* as the court below ought to have passed, and there is, therefore, no necessity for remanding the case under the act of 1832, ch. 302.

3rd. The question then recurs, is there fraud or not in this case sufficient to warrant the court below in vacating the deed? Upon this point I think no doubt can be left upon the mind of any one who reads this record. Under the facts and circumstances as disclosed by the record, the deed is utterly fraudulent, covinous and void both at common law and under the statute of 13*th Eliz.*, *ch.* 5.

Mason, J., delivered the opinion of this court.

We do not consider that there is any question of jurisdiction involved in this case. That a court of equity has power to pronounce the deed in question to be void upon the ground of fraud, whether under the statute of *Elizabeth* or under our insolvent system, there can be no doubt; and this was the main, if not the exclusive, ground, upon which the jurisdiction of the court of equity was invoked in the present case. The objections taken by the appellant to the proceeding are, want of proper parties and error in directing the sale of the property in a mode different from that designated by the insolvent laws.

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The material facts of the case are simply these: After the application of the appellant for the benefit of the insolvent laws, and before this proceeding was instituted, the trustee of the insolvent died and no successor has been appointed in his stead, in pursuance of the act of 1805, ch. 110, sec. 4. In this state of the case, the complainants filed their bill to vacate the appellant's deed, executed prior to his application aforesaid, upon the ground of its being in fraud of creditors. The appellant now contends, that before this proceeding could be regularly instituted, it was the duty of the complainants, or some other interested party, to have applied to the law side of the circuit court for the appointment of a new trustee, who should thereupon have been made a party to this equity proceeding. This position is undoubtedly correct. The theory of our insolvent system regards the trustee as the mutual representative of the rights and interests of both the debtor and his creditors, and any proceeding like the present, which is designed to effect those rights and interests, must embrace the trustee as a party to it. Upon this ground alone we find sufficient to warrant us in reversing this decree and in remanding the cause.

As this case is remanded, we have no difficulty in adding, that a court of equity had no power to decree a sale of this property by a trustee of its own selection. It had power to declare the deed *void*, and no more. Immediately thereupon the title vested, under our insolvent system, in the trustee in insolvency, and he was the party to make the sale and administer the assets of the insolvent under the direction of the court of law. This doctrine is established for the purpose of preventing a conflict of jurisdiction which would inevitably result from an opposite theory, and has been recognised by a number of cases heretofore decided in this court. Besides, there is no valid reason why it should be otherwise. Our laws have conferred upon the circuit courts, as courts of law, the amplest powers to administer and settle the estates of insolvents, through the instrumentality of a trustee appointed under the insolvent system, and there can therefore be no reason for invoking the aid of a court of equity. In support of these views we refer

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to the cases of *Alexander vs. Ghiselin*, 5 *Gill*, 179; *Waters vs. Dashiell*, 1 *Md. Rep.*, 472; *Manahan vs. Sammon*, 3 *Md. Rep.*, 463.

Unless the aspect of this case should hereafter, upon the coming in of the new trustee as a party, be materially varied, we have no hesitation in saying that the deed was properly vacated, upon the evidence as disclosed in the record, as being in fraud of the rights of creditors.

Decree reversed and cause remanded.

Jonas Deal *vs.* Alexis Harris.

If an inferior judge has *jurisdiction* and gives a wrong judgment, resulting from the erroneous conclusion at which he arrives, neither he nor the plaintiff in the action can be made a trespasser by enforcing the judgment if it remains unreversed and unpaid.

The mere fact that a party was discharged under the insolvent laws, does not *necessarily* present a case of want of jurisdiction in a justice of the peace to render a judgment against him for a cause of action accruing prior to his application.

Appeal from the Circuit Court for Carroll county.

This was an action of assault and battery, and false imprisonment, by the appellant against the appellee.

The pleas were *non cul.* and justification under and by virtue of a writ of *ca. sa.*, and commitment thereon issued by one Houck, a justice of the peace for Carroll county, upon a judgment rendered by said justice on the 14th of February 1851, in favor of the defendant against the plaintiff for $1.50 damages, and $4.95 costs.

The plaintiff replied in substance, that on the 5th of April 1850, he applied for the benefit of the insolvent laws, and in September following obtained his final discharge thereunder, after having complied with all the provisions of said laws; that the cause of action on which the judgment mentioned in the plea was recovered accrued to the defendant and was due

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by the plaintiff before the date of his said application, and was for a sum of money less than twenty shillings; that at the trial of the cause before the justice he pleaded and produced his final discharge under said laws; that the *ca. sa.* and commitment were based upon the judgment so rendered by said justice, and that he could not be rightfully arrested and imprisoned for the non-payment of the sum of money mentioned in said judgment.

To this replication the defendant demurred, and assigned as cause of demurrer that the judgment rendered by the justice being rendered by a court of competent jurisdiction, is conclusive upon the parties to it, and so long as it remains in force cannot be impeached for informality, error or mistake, in the matter adjudicated, and that all proceedings under said judgment as stated in the plea were legal, valid and justifiable; and also that said replication is in other respects uncertain, informal and insufficient, and is not a full and complete reply to defendant's pleadings.

This demurrer the court (NELSON, J.,) sustained, and gave judgment thereon for the defendant, from which the plaintiff appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

Wm. P. Maulsby for the appellant, argued:

That under the act of 1805, ch. 110, and its supplements, the appellant was *absolutely* released and discharged from all debts and causes of action existing and accruing prior to his application on the 5th of April 1850, and his plea of such discharge ousted the jurisdiction of the justice to render the judgment and issue the *ca. sa.* and commitment thereon. The demurrer admits the fact that the debt was incurred prior to the discharge, and the question therefore is distinctly presented, whether a justice of the peace has jurisdiction to enter a judgment and issue execution thereon against a party who has been duly discharged under the insolvent laws, for a cause of action arising prior to his application, when it appears by the

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record that the plea of discharge was produced and not controverted, and no plea or evidence appears to take the claim out of the operation of these laws? The judgment was for a less sum than twenty shillings, and therefore being prior to the new constitution, and the acts of Assembly pursuant thereto, the appellant had no power of appeal from the judgment of the justice, and unless such judgment can be inquired into in this case it never can be inquired into before any tribunal. It is for the appellee to show *affirmatively* that there was a *new promise* if he makes this an objection to the replication.

Joseph M. Palmer for the appellee, argued:

1st. That the facts set out in the replication do not necessarily present a case of want of jurisdiction in the justice to render the judgment. From any thing that appears in the replication the appellant may have made a *new promise* to pay this debt; or he may have acquired property which under the exceptions in the insolvent laws would have been liable for his debts. All these facts should have been negatived by the replication before the case of an ouster of jurisdiction will arise.

2nd. The judgment was rendered by a court of competent jurisdiction over the subject matter, and was rendered after the appellant applied for the benefit of the insolvent laws, and hence his discharge thereunder could not render the appellee a trespasser in attempting to execute it. The discharge could in no way affect the judgment. The principle is incontrovertibly settled, that a judgment of a court of competent jurisdiction, when coming incidentally or collaterally in question in any other court, is conclusive upon the question decided and cannot be impeached on the ground of informality in the proceedings, or for error or mistake in the court in the matter which was adjudicated. 1 *Gill*, 214, *Bowie vs. Jones*. 11 *G. & J.*, 218, *Magruder vs. Peter*. 12 *Do.*, 442, *Miles vs. Knott*. 8 *Do.*, 349, *Marshall vs. Greenfield*. 2 *H. & G.*, 50, *Raborg vs. Hammond*. 6 *H. & J.*, 182, *Barney vs. Patterson*. 4 *Do.*, 394, *Fishwick vs. Sewell*. 3 *Md. Rep.*, 55, *Ranoul vs. Griffie*. 6 *Do.*, 444, *Moore vs. Garrettson*.

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3rd. The plaintiff has misconceived his action, for if he has any remedy for the injury complained of, *case*, and not *trespass*, is the proper one. Whenever an injury to a person or his property is occasioned by regular process of a court of competent jurisdiction, even if maliciously adopted, the remedy is by an action on the case and trespass does not lie. 3 *Term Rep.*, 185, *Belk vs. Broadbent.* 2 *Saund. Pl. & Ev.*, 319, 651. 11 *G. & J.*, 81, 86, *Warfield vs. Walter.* 3 *Do.*, 385, *Turner vs. Walker.* 3 *Esp.*, 136, *Cooper, et al., vs. Booth.* *Habart*, 205, *Warterer vs. Freeman.*

Eccleston, J., delivered the opinion of this court.

In treating of what kind of erroneous proceedings will sustain an action like the present, the authorities recognize a distinction, in some respects, between the proceedings of courts of general jurisdiction and of tribunals having but limited powers. It is said, however, in 1 *Chitty's Pl.*, 181, (*Ed. of* 1851:) "In general no action whatever can be supported for any act, however *erroneous*, if expressly sanctioned by the judgment or direction of one of the superior courts at Westminster, or even by an inferior magistrate, acting within the scope of his jurisdiction." Notwithstanding there may be exceptions to the general rule thus stated, yet it is certainly true, that if the inferior judge has jurisdiction, although he may give a wrong judgment, provided the error results from the erroneous conclusion at which he arrives, neither the judge nor the plaintiff in the judgment can be made a trespasser, by virtue of enforcing the same, if the judgment remains unrescinded and unpaid. Page of *Chitty* above cited. 3 *M. & S.*, 425, 426, 427, 428, *Ackerley vs. Parkinson, et al.* 3 *Wend.*, 205, *Putnam vs. Man.* 2 *Wend.*, 604, *Relyea vs. Ramsay.* 7 *Wend.*, 203, 204, *Horton vs. Achmoody.* 1 *Pet. S. C. Rep.*, 340, *Elliott, et al., vs. Peirsol, et al.*

In 2 *Wils. Rep.*, 385, *Perkin vs. Proctor & Green*, a distinction is taken between *irregularity* and *error* in reference to judgments. And the court say: "Where a judgment is vacated for irregularity, the party is never excused if an execution is executed thereupon; yet the sheriff's officer is excused,

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because he has the king's writ to warrant him." And again they say: "In the case of an irregular judgment against the plaintiff and a *capias ad satisfaciendum* executed thereupon, in trespass and imprisonment, the party and the officer joined in a plea of justification under the writ, and the officer was therefore held guilty as well as the party; but where a judgment is reversed for error it is different, and stands good until reversed, one case is the fault of the party himself, the other is the error of the court."

After an examination of the authorities referred to, and the cases of *Turner vs. Walker*, 3 *G. & J.*, 385; *Warfield & Mactier, vs. Walter*, 11 *Ib.*, 85, 86, and *Ranoul vs. Griffie*, 3 *Md. Rep.*, 59, 60, we do not think the plaintiff can maintain his suit. The facts set out in the replication do not necessarily present a case of want of jurisdiction by the magistrate, and a mere error of judgment on his part, (if there was any,) will not give the plaintiff a right of action. The judgment below, upon the demurrer, in favor of the defendant will therefore be affirmed.

Judgment affirmed.

STATE, use of MARTHA ANN MANNING, *vs.* ALLEN BAKER and others.

The accounts of a guardian settled with the orphans court are but *prima facie* evidence of their correctness.

Where the orphans court appoints a person guardian, expresly upon the ground that he agreed not to receive any allowance for the support of the ward, such appointment operates as a binding contract between the appointee and the court acting for the minor, which the latter may claim the benefit of by an action on the guardian's bond; the court in such case stands *in loco parentis* to the infant.

A prayer, that from the pleadings and evidence the plaintiff is entitled to recover a certain sum appearing by his account to have been allowed to a guardian, is defective in taking from the jury the finding of the truth of the facts set out in it.

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State, use of Manning, vs. Baker, *et al.*

APPEAL from the Circuit Court for Carroll county.

Debt on a guardian's bond in the name of the State, for the use of Martha Ann Manning, the former ward, against Allen Baker, the guardian, and his sureties.

The plaintiff *declared* upon the bond generally, and the defendant *pleaded* general performance. The breach assigned in the *replication* was, that the guardian had received the sum of $116.83 for the use of his ward, which he failed to pay over to her when she arrived at the full age of twenty-one, to wit, on the 1st of January 1850. The defendant *rejoined* that he had settled an account as guardian in the orphans court on the 4th of January 1842, in which he had charged himself with the said sum of $116.83, (it being all the property or estate of his ward that he had ever received,) and claimed a credit for $112.26 for the board, clothing, tuition, support and maintenance of his ward, which the orphans court allowed, as well as the further sums of $2.55 register's fees, and $2.02 guardian's commissions, which several credits amounted to the said sum of $116.83. The plaintiff *surrejoined* that this account was fraudulent and false, and that the several allowances so made by the orphans court were unjust and improper, and ought not to be allowed. Upon this surrejoinder issue was joined.

Exception. The plaintiff offered in evidence the guardian's bond, showing that he became such guardian on the 6th of November 1835, and the account settled by him in the orphans court, referred to in the pleadings, containing the credit for $112.26 for the board, &c., of said Martha, from the 20th of November 1834 to the 1st of January 1842; and then offered to prove by Jesse Manning, that he was the uncle of Martha, the ward; that in November 1835, witness was present with defendant in the orphans court, and then and there stated to said court that he (the witness) was willing to become the guardian of Martha, and support, maintain, educate and clothe her without receiving any compensation therefor, until she should attain her majority, and to receive and take care of her money and property until such time and not charge any thing therefor, and claimed to be appointed such guardian. That

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defendant thereupon agreed with witness and the judges of said court, that if witness would waive his claim to be appointed guardian, he (defendant) would agree to become such guardian, and would board, clothe, educate, support and maintain said Martha until she should attain her full legal majority, without making any charge or receiving any compensation therefor; that he would do it gratuitously, and would also take care of her money and property until her majority and make no charge therefor in any manner whatever, and account to her when she attained majority for the full amount thereof, principal and interest, without any deduction therefrom, either for his own trouble or for her board, clothing, tuition, support and maintenance; that he stated he was without any children of his own and was very anxious to be allowed to take said Martha and have the care, support and maintenance of her for his own pleasure and gratification. That in consequence of these assurances and declarations of the defendant, witness then and there agreed with defendant to waive his claim to be appointed guardian, and agreed to the appointment of the defendant. That in consequence of this agreement the court appointed the defendant guardian of said Martha, and at the time of said appointment it was expressly agreed and understood by defendant and witness, and the judges of the court, that defendant was appointed upon the understanding and agreement that he was not to charge or receive any compensation whatever for the board, clothing, tuition, support and maintenance of said Martha at any time whatever until she should become of age as aforesaid, and that he would take care of her money and property and make no charge therefor, and would pay over the same with the interest and increase thereof to her on attaining majority. That after his appointment defendant repeatedly made declarations to the same effect, viz., that his appointment was made by the court upon the understanding and agreement aforesaid. That the judges of the orphans court on the 4th of January 1842, (when the guardian's account was settled,) were not the same persons who were such at the time the appointment was made. That when the appointment was made it was expressly understood

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and agreed between witness, the judges of the court and the defendant, that the conditions, understandings and agreements under which he was appointed should be entered upon the records of the court and be made part of the record attesting and accompanying his appointment. To the admissibility of this evidence the defendant objected, which objection the court (NELSON, J.,) sustained, and to this ruling the plaintiff excepted.

2nd Exception. It was then admitted that defendant was appointed guardian of said Martha on the 6th of November 1835. The plaintiff then prayed the court to instruct the jury, that upon the pleadings and evidence in the case the plaintiff is entitled to recover the sum which appears from the evidence was allowed by the orphans court to defendant for the board, clothing, tuition, support and maintenance of said Martha from the 20th of November 1834, to the 6th of November 1835. The court rejected this prayer, and instructed the jury that the plaintiff was not entitled upon the pleadings and evidence in this case to recover any amount whatever. To this ruling the plaintiff excepted, and the verdict and judgment being in favor of the defendant, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

William P. Maulsby for the appellant, argued:

1st. The issue presented by the pleadings in this case is, whether the guardian's account settled in the orphans court was fraudulent or not? It is well established that such accounts are only *prima facie* evidence of their correctness; they are still open for examination. 3 *H. & J.*, 251, *Spedden vs. The State*. The evidence offered clearly tended to prove this issue. It shows that the appellee obtained this guardianship upon the express understanding and agreement that he was to charge nothing for the ward's board, tuition, support and maintenance. This contract was clearly binding upon him and was founded upon a sufficient consideration. 10 *G. & J.*, 278, *Stockett vs. Jones*. The further fact appeared from the

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pleadings and evidence, that the ward did not attain her majority until 1850, and the account being settled so soon after the appointment in 1835, and so long before the ward would attain her majority, was a circumstance to go with the evidence offered to the jury. 7 *H. & J.*, 36, *Davis vs. Davis.* 7 *G. & J.*, 20, *Cole vs. Hebb.* Fraud cannot be proved by direct testimony, but any fact, however slight, bearing at all upon the point at issue may be admitted as evidence. 5 *G. & J.*, 269, *Davis vs. Calvert.*

2nd. That the court invaded the province of the jury in its instruction given in the second exception, that the plaintiff could not recover at all in the action. Again, a guardian cannot be allowed for support and maintenance of his ward *previous* to his appointment as guardian, as the account in this case shows was done.

Joseph M. Palmer for the appellee, argued:

1st. That the guardian's account is *prima facie* correct, and the burden of showing the allowance to be incorrect is on the party assailing it. The evidence of Jesse Manning, as offered to the jury, was clearly inadmissible to prove the issues in the case as irrelevant. No evidence is admissible except it be pertinent to the issues made by the pleadings. 4 *H. & J.*, 315, *Benson vs. Anderson.* 2 *H. & G.*, 175, *Mitchell vs. Dall. Ibid.*, 182, *Ferguson vs. Tucker. Ibid.*, 82, *Birckhead vs. Saunders.* 5 *H. & J.*, 448, *Law vs. Scott.* 5 *G. & J.*, 269, *Davis vs. Calvert.* 8 *G. & J.*, 111, *Clarke vs. State, use of Darnall. Ibid.*, 248, *Steam Navigation Co. vs. Dandridge.* 1 *Phillips on Ev.*, 169.

2nd. The pretended contract or agreement entered into between the guardian and Manning, the witness, in the presence of the orphans court, was properly rejected, as it was a mere private contract between those two individuals, which could in no way affect the rights of guardian and ward, and could not properly be noticed by the orphans court in making the settlement with and allowance to the guardian. If Manning was injured by this private contract with Baker, he has his remedy for the breach of that contract in a court of law.

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Again, there is no *consideration* for the promise attempted to be set up. It was simply an agreement between Baker and Manning, that the one would give up his right if the other would agree to charge nothing for his guardianship.

3rd. The ruling in the second exception is clearly correct, as there is *not one particle* of evidence to justify the court in granting the plaintiff's prayer, and therefore it was properly rejected.

Le Grand, C. J., delivered the opinion of this court.

We are of opinion that the court below erred in refusing to allow the evidence offered by the plaintiff to be given to the jury. There can be no doubt, and it was not questioned in the argument, that the accounts of a guardian settled in the orphans court are but *prima facie* evidence of their correctness. The testimony proposed to sustain the case of the plaintiff had for its object the falsification of the accounts settled by the guardian, by showing that he was appointed such expressly on the ground that he was not to receive any allowance for tuition, board, &c., &c.

We think such a contract binding. Such an appointment of guardian operates as a contract between the person applying for the trust and the orphans court acting for the minor, which the latter may claim the benefit of in the manner sought here; the orphans court in such a case stands *in loco parentis* to the infant. It is not, as was supposed by counsel, like the case of the allowance of commissions to an executor. In the case of *McKim & Marriott, vs. Duncan, et al.*, 4 *Gill*, 72, the Court of Appeals held, it was not competent to a testator to deprive his executor of his commissions by anything he might put in his will. That decision, however, was based on the peculiar language of the act of 1798, chapter 101, which provides, that the commissions of an executor shall be, at the discretion of the court, *not under* five nor exceeding ten *per centum*. The law commands an allowance to a certain amount, and it is not within the power of either court or testator to defeat it. The case before us, although not precisely the same in principle, is somewhat analogous to that of *Stockett*

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vs. Jones, 10 *Gill & Johns.*, 278. There the court gave efficacy to what they considered an understanding between brother and sister, that the former should make no charge for the board of his sister. The proof in that case was not near as strong as the evidence offered in this.

These observations dispose of the question presented by the first bill of exceptions.

The court having refused to allow the evidence mentioned in the first exception to be given to the jury, there was of course nothing to justify the granting of the prayer contained in the second exception. Even had the testimony been in the case the prayer ought not to have been granted, inasmuch as by its form it took away from the jury the finding of the truth of the facts set out in it.

Judgment reversed and procedendo awarded.

Daniel Frazier *vs.* William Griffie.

It is error for a court to withhold evidence from the jury, when, by so doing, the court would be deciding the very fact in issue presented by the pleadings, as this would be usurping the functions of the jury.

There is no analogy between the *terms* of the magistrates' courts, under the act of 1835, ch. 201, and the terms of the county courts.

The magistrates' courts have no authority to strike out a judgment rendered at a previous meeting on the first day of their next meeting, by acting as of the *preceding term*.

Appeal from the Circuit Court for Carroll county.

Trespass quare clausum fregit, by the appellee against the appellant, for breaking and entering the plaintiff's close and taking therefrom his horse.

The pleas were *non cul.* and justification, under a *fi. fa.* sued out by the defendant and issued on the 11th of May 1850, upon a judgment of the district court of the 5th election district of Carroll county, rendered on the 25th of January 1850, in favor of the defendant against the plaintiff for $1.89

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debt, and $50.79 costs, which writ was duly issued to the sheriff of said county, who, in virtue thereof, took and sold the horse of the plaintiff to satisfy the judgment aforesaid. The plaintiff joined issue upon the plea of *non cul.*, and *replied* to the plea of justification that there was no such judgment as the defendant in his plea of justification had alleged. The defendant *rejoined*, that there was, on the 11th of May 1850, the day of issuing said writ of *fi. fa.*, a judgment rendered by said district court, on the 25th of January 1850, in full force, unreversed and unpaid, as stated and set forth in the plea of justification. Upon this rejoinder issue was joined.

Exception. The plaintiff proved that defendant entered upon his farm, and by his agent, the sheriff of the county, took the horse mentioned in the declaration from the plaintiff's possession.

The defendant then to prove the judgment mentioned in the pleadings, offered in evidence the docket entries of the district court of the 5th election district for Carroll county, showing that a judgment was rendered, on the 25th of January 1850, by Dorsey and Hewit, two of the justices of said court, in favor of the defendant against the plaintiff for $1.89 debt, and $50.79 costs; and that on the 22nd of February 1850, this judgment was stricken out by Manro and Hewit, two of the justices of said court, and a judgment entered in favor of the plaintiff for costs. He then further proved by said Dorsey and Manro, and other witnesses, that the case of *Griffie against Frazier* was tried at the December term 1849 of said district court and held over under a *curia* until the January term 1850, and on the 25th of that month the entry of judgment in favor of defendant by Dorsey and Hewit, contrary to the opinion of Manro, the other justice, was made; that when the court met again, on the 22nd of February, Hewit, having been convinced that he had made a mistake as to a matter of law in the judgment he had previously given, in concurrence with Manro, struck out the former judgment and gave the new judgment as of the January term of said court, and after this was done, they formally adjourned the January term and opened the February term of said court. This last entry of

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the judgment was made against the opinion of Dorsey, who did not consider that the court had any right to do so and refused to participate therein. That in regard to the adjournment of said court, the practice had been when their business was over to separate without saying any thing, or according to one of the witnesses, sometimes one of the judges would say, "We will now adjourn to our next meeting day."

The defendant then proved by Webb, that he was the sheriff of Carroll county in May 1850, and as such, sold the horse of the plaintiff in dispute; and further offered in evidence a *fi. fa.* issued by Dorsey, one of the justices of the said district court, on the judgment of the 25th of January 1850. This writ was issued on the 11th of May 1850 and is in the usual form, reciting the judgment of the 25th of January preceding. The defendant then further offered to prove by said Webb, that it was in virtue of this writ of *fi. fa.* that he seized and sold the horse in dispute; but the plaintiff objected to the admissibility of said writ and of the evidence of Webb in relation thereto, which objection the court, (NELSON, J.,) sustained, upon the ground that on the day of issuing said writ by said Dorsey, there was no judgment of the 25th of January 1850 in existence, and that the *fi. fa.* having been issued on such supposed judgment, was void and not admissible to prove the defendant's plea, and refused to permit the evidence of Webb and the writ of *fi. fa.* to go to the jury. To this ruling the defendant excepted, and the verdict and judgment being against him for the sum of $160 damages and costs, he appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

Joseph M. Palmer for the appellant, argued:

1st. The question as to the actual existence of a judgment unreversed and in force, of a court of inferior jurisdiction not of record, is always a question for the jury and not to be tried by the court by inspection, and particularly where the pleadings close to the country, as in this case. 1 *Chitty's Pl.*, 600. 3 *Phillips on Ev., by Cowen, note* 711. 17 *Johns.*, 272,

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Baldwin vs. Hale. 5 *East.*, 473, *Collins vs. Mathew.* 1 *Douglas*, 1, *Walker vs. Witter.* 28 *Eng. C. L. Rep.*, 314, *Thompson vs. Blackhurst* 10 *Eng. C. L. Rep.*, 424, *Plummer vs. Woodburne.*

2nd. The only questions of fact submitted to the jury in this case under the pleadings were, whether the judgment rendered by the district court, on the 25th of January 1850, was in full force when the writ of *fi. fa.* in question was issued, and whether the horse was seized and sold by the sheriff by virtue of this writ; therefore it is insisted, that the court below erred in rejecting the writ and the evidence of Webb, the same being both relevant and pertinent, and tending to prove the issues in the case. Whether the judgment was in existence was the issue to be proved, and surely we could show that the striking out of that judgment was not done by proper authority.

3rd. The court below erred in deciding that the writ of *fi. fa.* and the evidence of Webb, as offered to the jury, was inadmissible, because in rejecting said evidence, the court assumed to decide the questions of fact then pending before the jury under the pleadings in the case, and such assumption of power was an encroachment upon the province of the jury. 6 *G. & J.*, 63, *Crawford vs. Berry.* 4 *H. & J.*, 516, *Burt vs. Gwinn.* 2 *H. & G.*, 181, *Offutt vs. Offutt.* 1 *H. & G.*, 321, *McElderry vs. Flannagan.* 1 *G. & J.*, 1, *Pawson vs. Donnell.* 7 *G. & J.*, 20, *Cole vs. Hebb.* *Evans' Pr.*, 302.

William P. Maulsby for the appellee, argued:

1st. That the court was right in refusing to admit the *fi. fa.* in evidence, because it purported on its face to have been issued on a judgment which the defendant had shown by his *own evidence* had been *struck out*, and was not in existence at the time the *fi. fa.* bore date. The defendant himself offered in evidence the *docket entries* of the district court, which clearly showed that the judgment upon which he relied was stricken out at the time the *fi. fa.* issued. This is the defendant's *own proof* and he cannot *contradict it.* The issue is, whether the judgment was in existence on the 11th of May,

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when the *fi. fa.* issued, not whether it had been *correctly* stricken out or not.

2nd. No question arises as to the power of the district court to strike out the judgment of the 25th of January and enter the revised judgment of the 22nd of February, the evidence having been offered by defendant and not controverted by the plaintiff. But if the question were presented, the appellee would maintain the power and right of the court under the act of 1835, ch. 201, which provides, that the district courts shall have *monthly terms.*

3rd. The court below decided no question of fact and took from the jury no question of fact. It was obliged to decide upon the admissibility of the evidence under the circumstances as they existed. The defendant had pleaded justification under a *fi. fa.* upon a judgment set out in his plea. He had offered the evidence that there was *no such judgment*, and then proposed to follow up his proof of the *non-existence* of the judgment relied on in his plea, by proof that there was a *fi. fa.* issued upon a judgment which he had just shown to have no existence. It was clearly a question of admissibility of evidence and therefore for the court. That the *fi. fa.* was void if there was no judgment on which it was based, was a question of law and not of fact. Whether there was any proof tending to show the existence of the judgment pleaded by defendant, was a question of law. And how can it be said that there was such proof, when the defendant did not content himself with failing to produce it, but did produce the conclusive evidence of the contrary? 5 *H. & J.*, 32, *Mercer vs. Walmsley.* 7 *H. & J.*, 294, *Riggin vs. Patapsco Ins. Co.*

Mason, J., delivered the opinion of this court.

The issue presented by the pleadings in this case was, whether the judgment upon which the *fi. fa.* issued, and under which the alleged trespass was committed, was in full force and unreversed at the time of the issuing of the *fi. fa.*? In withholding the evidence from the jury, which constitutes the ground of this appeal, the court below assumed to decide the very fact in issue, and determined that there was no valid

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judgment in existence. This was an usurpation of the functions of the jury and was therefore erroneous. *Mitchell vs. Williamson*, 9 *Gill*, 71.

Although the question as to the regularity of the proceeding of the two justices in striking out the judgment previously rendered, strictly speaking, may not be presented on this appeal, yet as the question may hereafter arise in another aspect of the case, this court feel warranted in saying, that from the circumstances as disclosed by the evidence in this record, they can discover no authority in law for such a proceeding. The analogy which is supposed to exist between the terms, so called, of the magistrates' courts and the terms of the county courts, this court cannot discover from any thing contained in the act of 1835, ch. 201, by which these courts were created; but on the contrary, such a theory seems rather to be negatived by that act.

Judgment reversed and procedendo awarded.

Zachariah H. Busby *vs.* Charles Conoway.

In an action upon a promise made upon consideration of forbearance to file a *caveat* to a will, the declaration must show that the plaintiff was *interested* in setting the will aside.

It is a fatal objection to a declaration in such a suit that it fails to allege that the testator left *assets* after *payment of debts* in which plaintiff would have an interest.

In a suit for forbearance to sue the declaration must allege that there was a *debt due;* the allegation that a dispute and controversy existed respecting it is not sufficient.

In a suit based upon forbearance, the declaration must show that the forbearance promised by the plaintiff was either a detriment to him or a benefit to the defendant.

Appeal from the Circuit Court for Carroll county.

Assumpsit by the appellant against the appellee, to recover a sum of money agreed to be paid by defendant, in consid-

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eration that the plaintiff would forbear contesting the will of Zachariah Conoway.

The declaration alleges that the testator, Zachariah Conoway, made his will, by which, amongst other things, he bequeathed to the defendant real and personal property and estate of a large value, to wit, of the value of $5000, and died without altering or revoking the same; that Rachel, the wife of the plaintiff, is a child and heir at law of the testator, and that the plaintiff had determined to contest said will and file a *caveat* thereto in the orphans court when the same should be offered for probate, in the name of himself and wife, alleging, that the testator, at the time of making said will, was not of sound mind and not capable of making a valid will, of which intention and determination the defendant had notice, and thereupon, in consideration that the plaintiff would forbear and desist from contesting said will and filing a *caveat* thereto as aforesaid, the defendant undertook and promised the plaintiff to pay him as much money as a certain Belinda Jacobs was to have under said will, which was the sum of $200, whenever he should be thereto required; that relying upon this promise the plaintiff did from thence forbear and desist from contesting said will and filing a *caveat* thereto, according to his intention and determination as aforesaid, of which the defendant had notice, but has refused upon request to pay the plaintiff the said sum of $200, &c. The plea was *non assumpsit*.

Exception. The plaintiff proved by a competent witness, that on the evening after the burial of the testator witness read his will in the presence of the defendant, and the plaintiff and his wife Rachel, a daughter of the testator, and several other parties; that plaintiff's wife complained very much about the provisions of the will, and said it was not the will of the testator, that he had been unduly influenced by other persons to make it, and that there would be a law-suit about it. He then offered the will, by which the testator devised to his two sons, Zachariah and Charles, (the defendant,) all his real estate, comprising part of two tracts of land which are described in the will, and also all his personal estate not hereinbefore willed. After other pecuniary bequests, the testator also be-

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queathed to his daughter, Belinda Jacobs, $200, to be paid by his two sons seven years after his decease without interest. The plaintiff then further proved by another witness, that some two or three years after the death of the testator, witness went to the house of the plaintiff in company with the defendant, and whilst there plaintiff's wife, Rachel, asked defendant whether he did not promise her on the evening after her father's burial that he would give her $200 if she would say no more about her father's will? that defendant thereupon replied to said Rachel's inquiry, "Rachel, I did tell you that you should have as much as Belinda Jacobs was to get under the will, but I did not tell you when you would get it."

The defendant then prayed the court to instruct the jury, that from the pleadings and evidence in the case the plaintiff is not entitled to recover, *because:*—1st, his declaration is radically defective and bad on general demurrer, there being no good and legal consideration to support the promise set out in it. 2nd, there is a material variance between the allegations of the declaration and the evidence to sustain the case, in this, that the promise alleged is a promise made to the plaintiff, whereas the proof is that the promise was made to Rachel, his wife. (This 2nd reason was abandoned in argument in this court.) 3rd, there is a material variance between the declaration and the evidence, and the latter is not sufficient in point of law to entitle the plaintiff to recover on the promise alleged in the declaration. 4th, the plaintiff has not offered any legal and competent evidence, of a good and legal consideration, sufficient in law to sustain the allegations in the declaration and the promise upon which he seeks to recover.

The court, (NELSON, J.,) granted this prayer, and to this ruling the plaintiff excepted and appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

William P. Maulsby for the appellant, argued, that there is a sufficient consideration set out in the declaration to support the promise. A consideration is sufficient if it arise from any

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act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, however small, if such act is performed by the plaintiff with the consent, express or implied, of the defendant; 2 *Saund. Rep.*, 137, *note (g.)* 1 *Selw. N. P.*, 46, title, *Assumpsit.* 1 *Taunt.*, 523, *Williamson vs. Clements.* 4 *Do.*, 611, *Baily vs. Croft.* 5 *Barn. & Ald.*, 117, *Longridge vs. Dorville;* or by reason of any damage, or any suspension or forbearance of plaintiff's right at law or in equity; or any possibility of a loss occasioned to the plaintiff, although no actual benefit accrues to the defendant. 1 *Saund. Rep.*, 211, *c.* It is sufficient if a slight benefit be conferred by plaintiff on defendant or a third person, or even if the plaintiff sustain the least injury, inconvenience or detriment. 3 *Burr.*, 1670, 1672, 1673, 1674, *Pillans vs. Van Mierop.* 2 *Barn. & Cres.*, 474, *Bates vs. Cort.* The relinquishment of a doubtful title is a sufficient consideration. 4 *East*, 463, *Jones vs. Ashburnham.* 12 *Wend.*, 383, *Seaman vs. Seaman.* So also is the compromise of a doubtful right. *Newland on Contracts*, 78. 1 *Atk.*, 10, *Stapilton vs. Stapilton.* 1 *Peere Wms.*, 727, *Cann vs. Cann.* See also as to what will constitute a sufficient consideration, 1 *Gill*, 1, *Stevenson vs. Reigart.* 9 *Gill*, 460, *Cook vs. Duvall.* 4 *Md. Rep.*, 492, *Ellicott vs. Peterson.* This case differs from that of *Seaman vs. Seaman*, 12 *Wend.*, 381, thus: in that case the declaration alleged the making of a will and the devise of a large amount of property to the defendant and others, but, *non constat*, the plaintiff was not one of those others and equally interested with defendant in admitting the will to probate. In this case the declaration avers the devise by the will to the defendant alone, and on the face of the declaration the defendant was the only party interested in sustaining it. It also alleges that plaintiff's wife was heir at law, and therefore necessarily injured by the devise to defendant of the whole estate of the testator, so far as appears on the face of the declaration. The declaration therefore shows all that it is requisite.

Joseph M. Palmer for the appellee, argued:

1st. That the plaintiff has not alleged in his declaration any

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sufficient consideration to enable him to sustain his action upon the supposed promise against the defendant. There must be, to make a promise obligatory, some injury to the plaintiff or some benefit to the defendant, and this must appear in *the declaration*, otherwise it is considered a *nudum pactum*. 3 *Burr.*, 1673, *Pillans vs. Van Mierop*. 4 *East.*, 463, *Jones vs. Ashburnham*. 12 *Wend.*, 383, *Seaman vs. Seaman*. 1 *Parsons on Cont.*, 367. 11 *Mees. & Wels.*, 641. 1 *Strange*, 94, *Loyd vs. Lee*. *Forbearance* to sue and the *settlement* of a claim are different things. Where an action is brought on a promise to forbear to sue, the plaintiff must allege in his declaration that he had a *right of action*. In case of an action on a promise to settle a suit he must allege a *pending suit*, and in case of *forbearance* he must allege a *claim* which *could have been enforced*. There could have been no suit against the defendant here, and the only allegation is of a forbearance to file *a caveat*. This is *no claim*. It is only a fact to be established in order to lay the foundation for a claim.

2nd. It is not alleged in the declaration that the plaintiff was in any way interested in setting aside the will, or that he could be in the least benefited by contesting the will before the orphans court. There is no allegation that he or his wife would be entitled to a distributive share *after debts were paid*. 12 *Wend.*, 383. 4 *East*, 463. 1 *Stephen's N. P.*, 255 *to* 259. 4 *Mees. & Wels.*, 795, *Nelson vs. Serle*. 11 *Do.*, 641. 11 *G. & J.*, 161, *State vs. Gaither*.

3rd. There is no distinct and affirmative allegation in the declaration, that the testator was of unsound mind and incapable of making a valid deed or will, or that the will was obtained by fraud or undue influence, and even if there were apt and proper averments to this effect, there is not one particle of proof to show that there was the slightest cause or foundation for filing and sustaining a *caveat* to the will.

4th. The defect in the declaration, in not setting forth a good and legal cause of action, can be taken advantage of by a prayer to the court to instruct the jury that it is insufficient. 4 *G. & J.*, 467, *Berry vs. Harper*. 1 *Do.*, 429, *Higdon vs. Turner*. 3 *Do.*, 377, *Turner vs. Walker*. 11 *Do.*, 160.

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5th. There is a material variance between the contract or agreement set out in the declaration and that proved in the case. 2 *Doug.*, 666, *Bristow vs. Wright.* 5 *Term Rep.*, 496, *Peppin vs. Solomons.* 2 *East*, 446, *Williamson vs. Allison.* 1 *Greenlf. on Ev.*, *sec.* 53. *Gould's Pl.*, 160, 165. 8 *G. & J.*, 248, *Steam Nav. Co. vs. Dandridge.* 3 *H. & J.*, 383, *Walsh vs. Gilmor.*

Eccleston, J., delivered the opinion of this court.

The case of *Seaman vs. Seaman*, 12 *Wend.*, 381, is very similar to the present in several important particulars. There the *nar* alleged that the father of the plaintiff and of the defendants left a will, in which he gave to the *defendants and others* a large amount of property, real and personal; that after death of the father and before the will was proved, the plaintiff became dissatisfied with its provisions, and entertaining doubts in regard to the sanity of the testator at the time of the execution of the will, he filed a *caveat* against its being admitted to probate. That subsequently, in consideration that the plaintiff would withhold all opposition to the proving of the will, the defendants promised, in case the will should be proved and allowed, to pay to the plaintiff $500. The plaintiff also averred, that in consideration of the promise of the defendants, he promised to withhold all opposition to the probate of the will, and that he made no further opposition thereto, and that the will was thereupon duly proved and allowed, and letters testamentary were issued thereon to the defendants, who were named as executors in the will. Upon a demurrer to the *nar* judgment was given in favor of the defendants. And Justice Nelson, speaking for the court, says: "As, however, it does not sufficiently appear in the declaration that the plaintiff was *particularly* interested in setting aside the will of his father, and without this he could have no interest in contesting it before the surrogate, and of course lost nothing by the agreement, I think the demurrer well taken." In the particular which rendered that *nar* defective, the one before us is certainly quite as defective.

In *Edwards vs. Baugh*, 11 *Mees. & Wels.*, 646, the allega-

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tion being that certain *disputes* and *controversies* were pending between the plaintiff and defendant, whether the defendant was indebted to the plaintiff in the sum of 173*£*, 2*s*, 3d, and that in consideration of the plaintiff's promise not to sue, the defendant promised to pay him 100*£*, the *nar* was held bad, as not showing a sufficient consideration, there being no allegation of any debt being due, but simply that a dispute and controversy existed respecting it. Lord Abinger thought there was nothing in the word "controversy" to render the alleged consideration a good one, and that the controversy merely was, that the plaintiff claimed the debt and the other denied it. See the cases referred to in the note on page 647. Also 4 *East*, 455, 463, *Jones vs. Ashburnham;* 2 *Man., Gran. & Scott*, 548, in 52 *Eng. C. L. Rep.*, 546, *Wade vs. Simeon*, and 1 *Parsons on Cont.*, 365 *to* 367.

In *Jones vs. Ashburnham*, the *nar* was held bad, because it did not show that at the time of the promise made by the defendant there was any administration upon the estate of the deceased original debtor, or that he left any assets. In regard to the rule that "any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking," &c., as laid down by Mr. Justice Yates, in *Pillans vs. Van Mierop*, 3 *Burr.*, 1673, when considering how that rule would apply to the case as stated by the *nar*, in *Jones vs. Ashburnham*, Lord Ellenborough says: "Now how does the plaintiff show any *damage* to himself by forbearing to sue, when there was no fund which could be the object of suit; where it does not appear that any person *in rerum natura* was liable to be sued by him? No *right* can exist in this vague, abstract and indefinite way." And again he says: "But here, whether there were any representative, or any funds of the original debtor, does not appear." Grose, J., also refers to the defect in the *nar* for want of averring the existence of assets and an administration.

Rolfe, B., in *Edwards vs. Baugh*, denies the correctness of the proposition laid down by Mr. Henderson, in argument that forbearance would be a good consideration for a promise; so that, if it had appeared on the face of the declaration that

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nothing was due to the plaintiff, his forbearance to sue would even then be a consideration. The Baron says: "I cannot subscribe to that. I think the plaintiff is bound to show a consideration, in the shape of something, either beneficial to the opposite party or detrimental to himself."

The present *nar* contains no allegation that Zachariah Conoway, the testator, left any assets, either real or personal, after payment of his debts. Nothing is said having the slightest relation to the subject of assets, except simply that by the will, amongst other things, the testator devised and bequeathed to the defendant "real and personal property and estate of a large value, to wit, of the value of $5000." The *nar* therefore does not sufficiently show that the forbearance promised by the plaintiff was either a detriment to him or a benefit to the defendant, which we consider necessary in a suit based upon *forbearance*. The statement here made in reference to the gift of property by the will, is very similar to that in *Seaman vs. Seaman*, where the averment is, that "the father of the plaintiff and of the defendants, in his lifetime, made and published his last will and testament, whereby he devised and bequeathed to the *defendants and others* a large amount of property, real and personal."

There is no proof before us except what was given by the plaintiff. And although its truth, in every particular, be admitted, and the declaration be assumed to contain the statement of a sufficient consideration for the alleged promise of the defendant, nevertheless we do not think the proof sustains the contract as laid. An affirmance of the judgment must therefore follow.

Judgment affirmed.

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WM. HOUCK and wife *vs.* GREENBURY LOVEALL.

Where a patent is located by the plaintiff according to courses and distances and the calls are not located, it is admissible in evidence if *there be no counter-locations* of it by the defendant; but not if there be such *counter-location.*

Papers purporting to contain the defendant's locations and counter-locations *separate* from the plat and not *signed* by the sheriff or surveyor, and not referred to in their certificate accompanying the plats, cannot be treated as part of the proceedings under the warrant of survey.

But when such papers, though separate from the plats and not certified and signed, are referred to and returned with the certificate and plat, they will be regarded as part of the proceedings under the warrant.

In locating title papers, calls are to be gratified in disregard of course and distance, and *other tracts*, when called for, are as imperative as boundaries.

But it is not always necessary in such cases to locate the *entire tracts;* it is sufficient if the *lines* called for be located, though in ascertaining the correct position of such lines, it sometimes may be necessary to survey the whole tract.

In actions of *trespass q. c. f.* where defence is taken on warrant, the plaintiff must locate the *locus in quo* of the trespass, and show it to be within the lines of the land on which he alleges the act was committed.

No evidence as to the location of the lines called for in a patent unless such lines are located on the plat.

In an action of *trespass q. c. f.* and defence on warrant, if the plaintiff finds his locations unavailing, he cannot abandon them altogether and prove by parol his possession of the *locus in quo* and the trespass thereon, as if the plea were *non cul.* merely.

APPEAL from the Circuit Court for Carroll county.

Trespass q. c. f., by the appellants against the appellee, for breaking and entering their close, called "*Brown's First Attempt.*" Pleas, *non cul.* and limitations and defence on warrant. Issues were joined and a warrant of resurvey issued, under which locations were made and plats returned.

The patent of "*Brown's First Attempt,*" located by the plaintiffs, was granted upon a warrant of resurvey, and begins at the beginning of the whole tract called "*Rockland Enlarged,*" and runs thence a given course and distance to the end of the third line of said tract; thence a given course and distance to the end of the fifth line of said tract; thence with the sixth line of said tract a given course and distance until it

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intersects the sixth line of a tract called "*Moses Meadow;*" thence reversely and bounding on said tract several courses and distances until it intersects the ninth line of "*Rockland Enlarged;*" thence a given course and distance to the end of said line; thence a given course and distance until it intersects the sixth line of a tract called "*Better Known;*" thence a given course and distance to the end of said line; thence still bounding on said land a given course and distance till it intersects a given line of a tract called "*Hail's Venture Resurveyed;*" thence a given course and distance to the end of said line; thence with and bounding on "*Hail's Venture Resurveyed*" several courses and distances until it intersects the first line of a tract called "*Rotterdam Enlarged;*" thence a given course and distance to the beginning of said tract; thence still bounding on "*Rotterdam Enlarged,*" reversing the lines thereof, several courses and distances till it intersects a given line of "*Hail's Venture Resurveyed;*" thence with and bounding on said tract several courses and distances until it intersects a given line of the *original survey;* thence with and bounding on said survey reversely several courses and distances until it intersects a given line of "*Hail's Venture Resurveyed;*" thence a given course and distance to the end of said line; thence with and bounding on said tract several courses and distances until it intersects the third line of a tract called "*Mattingan;*" thence a given course and distance to the end of said line; thence a given course and distance until it intersects a given line of a tract called "*Lighty's Foundation;*" thence with and bounding on said tract several courses and distances to the beginning of a tract called "*Parlingan;*" thence with and bounding on said tract several courses and distances until it intersects the second line of the *original survey;* thence bounding on this survey reversely several courses and distances to the *beginning*. The location is made according to the *courses and distances* mentioned in the patent, and the lines of "*Rockland Enlarged,*" "*Moses Meadow,*" "*Better Known,*" "*Mattingan,*" "*Lighty's Foundation*" and "*Parlingan,*" called for in the patent, *are not located.* The lines of "*Hail's Venture Resurveyed,*" mentioned in the

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patent, are located, but the *whole tract* is not. The beginning and whole tract of "*Rotterdam Enlarged*" are located. The plat and explanations of the plaintiffs, accompanied by the certificate of the sheriff and surveyor, are given under the *seals* and *signatures* of the sheriff and surveyor. With these there were separate papers purporting to be the locations, counter-locations and explanations on the part of the defendant, including a counter-location of "*Brown's First Attempt*," but these papers were not *signed or sealed* by the *sheriff* or the *surveyor*, nor referred to in the certificate accompanying the plat and plaintiffs' explanations.

1*st Exception*. The defendant objected to the admissibility in evidence of this patent under the pleadings and plats in the case, which objection the court, (NELSON, J.,) sustained, and ruled that said patent was not admissible in evidence, because it was located on the plat by course and distance only, without regard to what the court conceived to be imperative calls contained in the patent. To this ruling the plaintiffs excepted.

2*nd Exception*. The plaintiffs then, for the purpose of proving their possession of the *locus in quo* the trespass was alleged in the declaration to have been committed, and independent of the plats and locations made in the case, offered to prove by a competent witness, that at the time of committing the alleged trespasses, the plaintiffs were in the actual and exclusive possession of the *locus in quo*, and had been so in possession thereof for more than twenty years, exercising undisputed ownership over the same, and that the *locus in quo* is part of "*Brown's First Attempt*." The defendant objected to the admissibility of this parol evidence, which objection the court sustained and refused to permit the evidence to go to the jury. To this ruling the plaintiffs excepted, and the verdict and judgment being against them, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

William P. Maulsby for the appellants, argued:

1st. That the location of "*Brown's First Attempt*" is *ad-*

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mitted by the pleadings to be correct, for there is no *counter-location* which can be regarded by this court. On the plat is a statement, entitled, defendant's explanations, but in fact it explains nothing, and if it did, is not signed and certified by either the sheriff or surveyor. So also accompanying the plat are papers, entitled, counter-locations on the part of defendant, but they are not certified to or signed by either the sheriff or surveyor. All the lines and objects appearing on the plat additional to those appearing to have been put there by order of the plaintiffs, are therefore nullities, (2 *G. & J.*, 193, *Mundell vs. Perry*,) and the plaintiffs' locations are admitted to be correct. Their locations being preferredly correct, the plaintiffs were at liberty to read the patent in evidence, the concession of the defendant being, that there is no disagreement between the courses and distances as located and the supposed calls.

2nd. But suppose there are counter locations, they only impose upon the plaintiffs the necessity to prove *prima facie* the *correctness* of their locations. This is an action of trespass, and the plats are not *pleadings* but *evidence only*, and this is the distinction between trespass and ejectment. 5 *Gill*, 321, *Funk vs. Hughes*. It is submitted, that the calls in this patent are directory only and not imperative for the lines of the tracts mentioned, and that the beginning of "*Rotterdam Enlarged*" is the only peremptory call; that where course and distance are given, it is sufficient primarily to locate the grant according to course and distance, and that the objects called for need not be located until something be shown, whereby it appears the course and distance and the calls do not correspond, or that the location is somehow in conflict with the rights of the other party. It is only in case of disagreement that the calls must be gratified and course and distance yield. 5 *H. & J.*, 163, *Carroll vs. Norwood*. 1 *H. & J.*, 128, *Ridgely vs. Norwood*. The court will not assume that course and distance does not agree with the calls, but will take the location to be good until the suggestion of non-agreement be made and sustained by the opposing party. Then, and not till then, can the court see that the course and distance must yield to the calls. If the rule is to prevail in every case in which the grant mentions the

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lines of another tract, that all the lines and all the tracts mentioned must be located, and when the tracts so mentioned and located refer to the lines of other tracts, those other lines and tracts must be located, and so on, *ad infinitum*, or at any rate until in the weary search a patent is found, *(rara avis,)* which mentions or refers to no other lines or tracts than its own, it would effectually exclude from the courts all actions of trespass and ejectment which would not justify the plaintiffs in incurring an expense for locations greater than the value of ordinary farms.

3rd. The defendant having taken defence on warrant, but none according to the plat, and having made on the record no claim or pretension, and no issue on locations being made up, the appellants respectfully insist, that they were at liberty to prove their case in the same way as if defence had not been taken on warrant. That in fact, the case stood at the trial upon the plea of *non cul.*, and that the plaintiffs made their locations at the requirement of the defendant, could not put them in a worse position, and therefore, that the court erred in rejecting the evidence offered in the second exception. 2 *H. & J.*, 351, *Hogmire vs. M'Coy*. 2 *G. & J.*, 193.

Joseph M. Palmer for the appellee, argued:

1st. That it is not necessary that either the sheriff or the surveyor should sign the *explanations*. The warrant of survey only requires the signature to the *plats*, and if *they* are signed all the proceedings under the warrant returned with them are duly and sufficiently verified.

2nd. It is a well settled rule of construction in this State, that calls in a patent, whether to artificial or natural objects, are to be preferred to course and distance, and hence, where a tract of land is described by course and distance and by calls, the calls are to be gratified in the location and construction of the patent, if they can be established, and the course and distance disregarded, if they do not correspond with the calls. 5 *H. & J.*, 163, *Carroll vs. Norwood*. 1 *H. & McH.*, 138, *Lord Proprietary vs. Jenings*. 2 *H. & J.*, 269, *Howard vs. Moale*. 5 *H. & J.*, 255, *Hammond vs. Ridgely*. 7 *H.*

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& J., 141, *Rogers vs. Moore*. 2 *G. & J.*, 54, *Rogers vs. Raborg*. 3 *G. & J.*, 142, *Thomas vs. Godfrey*. *Dorsey on Eject.*, 52. The patent in this case was therefore inadmissible as evidence to the jury, because there was no proper location of it upon the plats corresponding with the description and calls in it. 3 *H. & J.*, 469, *Mundell vs. Clerklee*. 4 *Do.*, 450, *Pennington vs. Bordley*, in addition to the cases cited above.

3rd. The parol evidence in the second exception was properly rejected, because the *locus in quo* and the plaintiff's possessions were not located on the plats and proof taken as to such possessions, and because such possession, as part of "*Brown's First Attempt*," could not be correctly located on the plats until the whole tract was legally and properly located. 5 *Gill*, 322, *Funk vs. Hughes*. 1 *H. & J.*, 171. 2 *G. & J.*, 205, *Mundell vs. Perry*. It is a settled principle in this State, that in all cases where defence is taken on warrant no title paper or object shall be given in evidence, unless the same is located on the plats. 4 *H. & McH.*, 287, 389, 499. 2 *H. & J.*, 249, 380. 3 *H. & J.*, 9, 228. 4 *H. & J.*, 1. 5 *H. & J.*, 127. 2 *G. & J.*, 193. 3 *G. & J.*, 290, *Blessing vs. House*. 7 *G. & J.*, 61, *Medley vs. Williams*. 1 *H. & J.*, 100, 119. Adversary possession cannot be given in evidence unless located on the plats. 1 *H. & J.*, 167.

Tuck, J., delivered the opinion of this court.

If the defendant below had counter-located the location, by the plaintiff, of "*Brown's First Attempt*," the ruling of the court would have been correct, for the reasons assigned in the exception. But we think there was no controversy as to the true location of the patent for that tract, and that it ought to have been received in evidence. The certificate accompanying the plat does not verify the papers called explanations, purporting to contain the defendant's locations and counter-locations. These are separate from the plat, not referred to in the certificate, nor signed by the sheriff and surveyor. They appear to be unfinished certificates of surveys and locations made subsequently to those on the plat, and cannot, in their

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present form, be treated as possessing the attributes ascribed to them by the appellee's counsel. We are not to be understood as intimating that explanations must always be certified and signed, when placed on another paper than the plat. They may be referred to, and returned with the certificate and plat, and when so identified will be properly considered as part of the proceedings under the warrant. We have carefully examined the plats and explanations in the case of *Mundell vs. Perry*, 2 *Gill & Johns.*, 193, and find that some of the remarks made in reference to their incompleteness apply with equal force to the present record.

As the record will be remanded, it is proper to add a few words as to locations of this kind. It is well settled that calls are to be gratified in disregard of course and distance, and that other tracts, when called for, are as imperative as boundaries. This is abundantly shown and explained in the Maryland decisions cited by the counsel for the appellee. But in such cases it is not always necessary to locate on the plats the entire tracts mentioned. It is sufficient if the lines called for be laid down, though in ascertaining the correct position of these lines it sometimes may be necessary to survey the whole of the tract. *Mitchell vs. Mitchell*, 8 *Gill*, 98.

In actions of this description, where defence is taken on warrant, the plaintiff must locate the place of the trespass, and show it to be within the lines of the land on which he alleges the act to have been committed. As the position of "*Brown's First Attempt*" depends on that of other tracts mentioned in the patent, and as the calls for parts of these other tracts must be gratified, we cannot perceive how the jury can determine that the *locus in quo* is correctly shown on the plats, in the absence of evidence as to the lines called for; and it is quite clear, that no such evidence is admissible unless they are located. *Funk vs. Hughes*, 5 *Gill*, 315.

The second exception assumes that, in trespass *quare clausum fregit* and defence on warrant, if the plaintiff cannot make his locations available at the trial, he may abandon them altogether, and prove his possession of the *locus in quo* and the trespass thereon, in the same manner as if the plea were *non*

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cul. merely. If this were the law the defendant could not, in any case, derive benefit from the defence on warrant. That it is not, however, is manifest from the authorities cited on the part of the appellee, as well as the character and object of the warrant of resurvey in such cases. 5 *Gill*, 315. We speak of the law as it was before the passage of the act of 1852, ch. 177.

The *second* exception is affirmed, but the judgment must be reversed on the *first*, because, in the absence of a counter-location of the patent for "*Brown's First Attempt*," it should have been admitted in evidence.

Judgment reversed and procedendo ordered.

St. Geo. W. Teackle, Permanent Trustee of Geo. Carey, Geo. T. Wethered and John H. O'Donnell, *vs.* George S. Gibson.

Since the act of 1841, ch. 163, the defendant cannot rely in this court upon any objection to the jurisdiction of the court below, unless it appears by the record that such objection was made below.

Where a *defendant* pleads two pleas, one of which is overruled and the other sustained and the bill dismissed, and the *complainant* appeals, this court will consider *both pleas*, and if either is a good defence, will affirm the decree dismissing the bill.

In all cases of concurrent jurisdiction between courts of law and equity, the statute of limitations is equally obligatory in each court.

Where an insolvent debtor makes a fraudulent transfer of money and personal property to a favored creditor, the trustee in insolvency may maintain an action at law therefor against the preferred creditor.

Under the act of 1829, ch. 208, sec. 3, the *provisional trustee* has as full power to sue for and recover property fraudulently conveyed by the insolvent as the permanent trustee has.

Limitations will begin to run against such provisional trustee from the time of his appointment and qualification, and when once commenced, *continues* to run against the permanent trustee also.

Cross-Appeals from the Equity Side of the Superior Court of Baltimore city.

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The bill in this case was filed on the 8th of December 1850, by Teackle, permanent trustee in insolvency of Carey, Wethered and O'Donnell, to set aside an alleged fraudulent transfer and preference made by the insolvents, in 1840, in favor of the defendant, Gibson. The allegations of the bill and the facts of the case are fully stated in the opinion of this court. The court below, (FRICK, J.,) sustained one of the pleas of limitations filed by the defendant and overruled the other and dismissed the bill. From this decree both parties appealed.

The cause was argued before LE GRAND, C. J., TUCK and MASON, J.

Henry Winter Davis for the trustee:—1st, moved to dismiss the appeal of Gibson, because the decree dismissing the bill is in *his favor* and there is no decree or order *against him* from which any appeal lies. 2 *Md. Rep.*, 271, *Mitchell vs. Smith.* 9 *Gill*, 56, *Ramsay vs. Glass.* 5 *Md. Rep.*, 186, *Ringgold vs. Barley.* 8 *Gill*, 370, *Winter vs. Donovan.* 4 *G. & J.*, 407, *Charlotte Hall School vs. Greenwell.* 1 *Gill*, 32, *O'Reiley vs. Murdoch.* But if this motion should be overruled, the complainant then insists that the *first plea* was properly overruled by the court below, because the *provisional trustee* could not file a bill to set aside this fraudulent transfer and preference, nor has he any right to call a mortgagee to settle an account, nor has he any right to the possession of the mortgaged property; but this can be done only by the *permanent trustee.* Under the act of 1816, ch. 221, the provisional trustee is simply made the *custodiary*, for the time being, of the property which was in the possession of the insolvent, and he cannot sue for it unless it has been taken out of his possession, in which case he may maintain an action as *special bailee.* 5 *H. & J.*, 403, *Kennedy vs. Boggs.* Where the statutes refer to the provisional trustee, they speak only of property in the possession of the insolvent or *choses in action*, which the insolvent himself could *sue for and collect;* but in the case of fraudulent deeds and preferences, the insolvent himself has *no*

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right to sue, for they are good as *against him*, though fraudulent as to *creditors*. The act of 1819, ch. 84, sec. 8, only requires the provisional trustee to give bond for the delivery over to the permanent trustee of the property and estate of the insolvent in his hands, and does not vary or enlarge the *powers* conferred upon him by the act of 1816. The 10th section of the act of 1825, ch. 205, simply requires the provisional trustee to execute a deed conveying to the permanent trustee that property only which had come into his hands under the previous laws. The act of 1829, ch. 208, sec. 3, dispenses with the necessity of a deed from the insolvent to the provisional trustee, and, according to my construction of it, vests in him all the property, effects and claims of the *insolvent debtor;* that is, such as the *debtor himself* could sue *for and recover*. But property fraudulently conveyed by the insolvent is not that to which the insolvent himself has any *title or claim*. This act therefore refers only to the powers conferred upon the provisional trustee by *previous laws*, and invests him with no *new powers*. There is a very good reason why the provisional trustee should not have the power to sue in such a case as this. The law nowhere provides that the permanent trustee may *carry on* a suit instituted by the provisional trustee, and the suit so instituted must therefore fail. See also on this point 2 *H. & G.*, 24, *Brown vs. Brice*. 4 *G. & J.*, 385, *Glenn vs. Karthaus*. 5 *Gill*, 138, *Alexander vs. Ghiselin*.

2nd. The appeal of the complainant presents the two general questions:—1st, whether the plea of limitations allowed by the court below is a defence to the claim *made by the bill?* and 2nd, whether in *the form* in which it is pleaded it is a good defence?

The bill by its allegations and prayers seeks two measures of relief which are perfectly consistent with each other, and to neither of them is the plea of limitations of three years either applicable or a bar:—1st. So far as the bill charges a transfer of assets by way of *security* against *liabilities*, and prays an account of the assets transferred, and of the liabilities actually existing or discharged, and for payment and delivery to the trustee of the assets not collected or not actually applied, the

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limitation of three years has and can have no application. The plea *confesses* the *mortgage*. It does not aver an adverse possession, but leaves it where the bill leaves it,—a possession as *mortgagee*. And on that fact alone the case of *Alexander vs. Ghiselin vests* the right of the insolvent trustee to the possession of the assets so mortgaged, and when they get into his hands he administers them according to the liens and priorities recognised by the law. No court has ever held the plea of possession of a mortgaged chattel, note or money, for three or six years any bar to a suit for an account and payment of the residue. *A fortiori*, can such plea be no bar to a bill for an account of a general transfer, of notes, open accounts and bonds, which must be collected, and of goods which must be sold, where the time assigned to sell and collect must be of uncertain duration, and where the liabilities which they are to meet and protect are not specified and may not be due for months or years, or may be matter of dispute and litigation? yet *such* is the *exact* case made by the bill, and the consequence of sustaining the plea is to give the whole assets transferred to the defendant without account, though on the face of the bill, and admitted by the plea, they are twice or three times the liabilities *alleged* but not *admitted* to exist. These propositions cover so much of the bill as relates to the assets unliquidated and unapplied to the discharge of liabilities actually incurred and paid. It is simply the claim of a mortgagor to an account and payment of the balance, which entitles him to the balance on a final settlement of the whole matter, united with the claim of the insolvent trustee under our acts to receive possession of the unapplied assets, and to administer them himself under his responsibility as representative of the creditor and debtor. As to limitation to a mortgage, see 3 *H. & McH.*, 328, *Lamar vs. Jones*. 3 *G. & J.*, 389, *Green vs. Johnson*. 6 *Do.*, 80, *Callis vs. Tolson*. *Ibid.*, 275, *Dougherty vs. McColgan*. 7 *Do.*, 20, *Cole vs. Hebb*. 10 *Do.*, 217, *Tiernan vs. Rescaniere*. 6 *Gill*, 445, *Griffith, et al., vs. Reigart & Wife*. 4 *Wash. C. C. Rep.*, 631, *Wisner vs. Barnet*. 4 *Cranch*, 415, *Higginson vs. Mein*. 6 *Wheat.*, 481, *Prevost vs. Gratz*. 5 *How.*, 233, *Taylor vs. Benham*. 1 *Hare.*, 594,

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Portlock vs. Gardner. 4 *Younge & Collyer*, 42, *Denys vs. Shuckburgh.* 4 *Mylne & Cr.*, 1, *Attorney Gen. vs. Fishmongers Co.*

2nd. But the bill, after praying that relief, asks the *additional relief* that the assignment may be declared fraudulent and void against creditors. The result of obtaining this relief, in addition to that above mentioned, is, that if the defendant has actually received any money from the things transferred, *over and above his dividend under the insolvent assignment*, he will under this prayer be obliged to pay such difference to the trustee for the benefit of the other creditors. It is therefore plain that *this* relief is not inconsistent with the former, but in addition to it and of the same nature, and that the former may be granted and this fail. *Albert & Wife, vs. Winn & Ross*, 7 *Gill*, 446, and 5 *Md. Rep.*, 66, and 2 *Md. Ch. Dec.*, 42, 169. *Thomas vs. Doub*, 8 *Gill*, 1. Any relief consistent with the allegations of the bill may be granted if it contains a *general prayer*. 10 *G. & J.*, 108, *Gibson vs. McCormick.* 6 *H. & J.*, 29, 30, *Chalmers vs. Chambers. Ibid.*, 292, *Drury vs. Conner.* Therefore, even if the plea be a bar to this part and purpose of the bill, it was erroneous to hold it good as to the other relief for being a good plea as to part only, and yet pleaded to the whole bill it was too wide, and for that reason alone should have been overruled.

3rd. But the plea, if intended to apply to this bill, considered as a bill, to avoid a fraudulent assignment, is entirely misconceived. A conveyance giving an improper preference against the insolvent laws is fraudulent and void, because a fraud on the rights of creditors to have the property equally distributed among them. It is not merely an implied and constructive fraud, but an actual, intentional and dishonest fraud, which knowingly attempts to take from the other creditors the difference between the dividend and the property conveyed. It is a worse fraud than taking property by a voluntary conveyance. *Act of* 1816, *ch.* 221, *sec.* 6. 7 *G. & J.*, 170, *Dulaney vs. Hoffman.* 1 *Md. Rep.*, 455, *Waters vs. Dashiell.* 1 *Am. Lead. Cases*, 50. 5 *H. & J.*, 403, *Kennedy vs. Boggs.* The question then is, when does the statute begin to run in

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cases of such *fraudulent preferences*. If the fraud exists and be not known, the rule of equity is clear that the statute only begins to run from *the discovery of the fraud*. 2 *Story's Eq.*, *sec.* 1521, *(a.)* 6 *Wheat.*, 497, *Prevost vs. Gratz*. The bill here alleges that this discovery was made within three years before filing the bill, and the plea *admits* this allegation, not being accompanied with an answer denying the fraud *or the time of its discovery*. Now the plea, if available *at all*, must go either:—1st, to the possession of the property, or, 2nd, to the debts of the creditors represented by the complainant.

1st. A fraudulent *assignee* stands exactly in the place of the fraudulent *assignor* as against a suing creditor of the assignor. He can take *all* the defences which would be available for the assignor at the same time and under the same circumstances, but he can take no other. The insolvent trustee in this suit represents as well the *creditor* as the assignor, and has the right of both free from the disabilities of the assignor. The first principle of the statute against conveyances to hinder, delay and defraud creditors, is, that as respects the claim of the *creditor* the property is considered as never having been out of the hands of the *debtor*, entirely irrespective of the length of time during which it may have been held by the *fraudulent donee*. No instance exists of a plea of limitations based on the *possession* of the property by a fraudulent donee in the English courts, and there is none in the Maryland courts. This court has never decided that a fraudulent grantee can plead that he has *held* the property *for more than three years*, and thus interpose the plea of limitations. They have only decided that he may plead limitations to the *debts* of the suing *creditors*. The reason is that the fraudulent *donee* stands in the place of the *donor;* the property is regarded as in the *donor's* possession, and a plea by *him* of limitations based on possession would be an *absurdity*. The only mode in which limitations ever did, or ever could apply, in England, was on the ground of *laches*, in failing to prosecute the fraudulent donee after obtaining *judgment* and a *right* to execution against the donor, which was the condition precedent to a right to sue the *donee*. On these points see 5 *Gill*, 449,

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Worthington vs. Shipley. 1 *Md. Rep.*, 455, 470, 472, *Waters vs. Dashiell.* 2 *Brock.*, 285, 288, 289, *Gallego vs. Gallego.* 5 *G. & J.*, 432, *Birely & Holtz, vs. Staley.* 2 *H. & G.*, 191, *Strike vs. McDonald.* 7 *How.*, 220, *McLaughlin vs. Bank of Potomac.* 11 *Wheat.*, 213, *Hinde vs. Longworth.* 2 *Dessa.*, 215, *Buist vs. Smyth.* 4 *How.*, 503, 560, *Michoud vs. Girod.* 11 *Wheat.*, 78, *Brooks vs. Marbury.* 6 *Wheat.*, 481, *Prevost vs. Gratz.* 8 *Pet.*, 244, *Gregg vs. Sayre.* 2 *Bland*, 26, *Kipp vs. Hanna.* 10 *Pet.*, 177, *Boone vs. Chiles. Story's Eq., secs.* 437, 439, 1265, 1520, *(a.)* 7 *G. & J.*, 170, *Dulaney vs. Hoffman.* 11 *Mees. & Wels.*, 530, *Grimsby vs. Ball.*

2nd. The only other aspect in which a plea of limitations can be considered in such a suit is as applicable to the *debt* of the creditor. Here again the right of the *donee* is the right of the *donor*. He has *all* his rights, but he has *no more* than his rights; for the principle of the law is, that it does not regard the property as *at all*, for *any purpose*, altered by the fraudulent conveyance. How far then is the plea of limitations applicable to the creditor's *debt?* As far in the mouth of the *donee* as it was in that of the *donor*, and *no farther*. In England there was no limitation to a judgment, and therefore there was *none* to a suit to enforce the judgment against the fraudulent donee, but the presumption of satisfaction from the lapse of twenty years. So long as execution can be obtained the right to levy it on the property fraudulently conveyed exists. This was available to the donee just as a plea of payment, accord and satisfaction or release would have been. In Maryland the plea of twelve years' limitation to a judgment would protect the *donee* if not sued until after judgment against the donor. If the donee be sued *before* judgment, under our act, then also he has open all the defences of the donor and *none other*. He may plead accord and satisfaction or release, or he may deny the debt by *non-assumpsit;* as to a judgment, he may plead *nul tiel record* if the proceeding were after judgment; or he may plead limitations of *three* years to the debt if simple contract, or twelve years if under seal. And so this court have held in *McDowell vs. Goldsmith*, 6 *Md. Rep.*,

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319, and 2 *Md. Ch. Dec.*, 370. But *in no case* has he ever been allowed to go behind a judgment and plead limitations to the original claim, because the judgment concludes him as well as the donor, unless rendered by fraud. 2 *Pet.*, 107, *Venable vs. Bank of U. S.* 4 *Wheat.*, 503, *Wheaton vs. Sexton.* It is therefore plain, that the plea of limitations in *this* case is utterly untenable, for there is no plea that *all debts* are barred by any limitation, and there may be debts by judgment or specialty which would not be barred for *twelve years*, while *three years* is the limitation here relied on. And there is no plea *at all* going to *this point*, but it rests exclusively on the accrual of the trustee's right against the *donee*, and has no relation to the *debts* he represents. The two points are totally distinct:—1st. If *possession* of the assets by the *donee* be the point, then it is immaterial whether the *debt* accrued yesterday or ten years ago. 2nd. If the plea goes to the *debt* then the possession may have been only of *yesterday*, and yet the debt being barred cannot be enforced against the *donee*, because it could not against the *donor*. The plea in this case involves the additional absurdity, that but for the *fraud* the mortgagee could be compelled to account, but because of the fraud his possession is argued to have been *adverse*, and not as *mortgagee*, and so barred by lapse of three years. The complainant had no remedy *at law* which he could enforce and which he is now seeking to enforce in equity, and it is therefore absurd to say that there is any *analogy* in such a case between law and equity.

3rd. But if applicable the plea is badly pleaded; for, 1st it goes to the whole relief when it should be confined to so much of it as prays a decree avoiding the assignment; 2nd, it does not meet the averments of a discovery of the fund within three years; nor of the other fact, of the time consumed in vacating a fraudulent assignment of the equity of redemption of these assets to Hinkley and Woodward within three years from which this suit was brought; 3d, nor is the plea accompanied with an answer going to the denial of these particular facts of avoidance by anticipation of the plea of limitations; nor is there any answer denying the *fund* in the assignment alleged

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in the *bill*. *Story's Eq. Pl., secs.* 674, 754, 815. 2 *Daniel's Ch. Pr.*, 7, 13, 716, 720, 721, 762, 763. 3 *G. & J.*, 491, 503, *Carroll vs. Waring*. 8 *Gill*, 322, 331, *Negro Franklin vs. Waters*. 3 *Leigh*, 729, *Shields vs. Anderson*. 2 *Younge & Collyer*, 58, *Booksbank vs. Smith*. 2 *Sch. & Lef.*, 634, *Hovenden vs. Lord Annesley*. 2 *Ball & Beatt.*, 118, *Blennerhassett vs. Day*.

William H. Norris for the defendant, argued:

1st. That as the appeal is from the decree *dismissing the bill* every point which will sustain the action of the court below is open upon the complainant's appeal, whether decided in favor of the defendant or against, or which are in fact presented by the record. Upon appeal from such a decree the simple question is, did the court below do right *in dismissing the bill*? This court has nothing to do with *the reasons* upon which the bill was dismissed. This is the result of the general principles of chancery law. 15 *How.*, 465, 466. *Corning vs. Troy Iron & Nail Factory*. 1 *Md. Rep.*, 395, *Young vs. Frost*. 1 *Cowen*, 702, *Atkinson vs. Manks*. 16 *How.*, 105, *Piquignot vs. Penn. Rail Road Co.* 6 *G. & J.*, 46, *Ellicott vs. Ellicott*. 1 *Gill*, 248, *Berry vs. Pierson*. But this is additionally so by force of the acts of 1830, ch. 185, and 1832, ch. 302, sec. 6, the former of which declares, that upon appeal from the final decree all previous interlocutory orders are open for review. 11 *G. & J.*, 364, *Lee vs. Pindle*. 3 *Gill*, 152, 153, *Dugan vs. Gittings*. 3 *Md. Rep.*, 210, *Boehme vs. Carr*. *Act of* 1831, *ch.* 319. 6 *How.*, 205, *Forgay vs. Conrad*. 7 *Gill*, 244, *Mong vs. Bell*. *Acts of* 1785, *ch.* 72, *sec.* 27; 1826, *ch.* 200, *sec.* 14, *and* 1818, *ch.* 193, *sec.* 1. Even *at law* such questions as arise on this appeal in favor of the appellee are examined on the appeal of the plaintiff when the judgment is against him and he alone appeals. This court has frequently said in common law cases, that if they see a plea of limitations which will bar the plaintiff's claim they will not send the case back even if they *reverse*. 1 *Md. Rep.*, 115, *Mudd vs. Harper*. *Ibid*, 208, *Dorsey vs. Dashiell*. 4 *G. & J.*, 470, *Berry vs. Harper*.

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6 *H. & J.*, 61, *Turnpike Co. vs. Barnes.* 6 *Gill*, 191, 200, *Emory & Gault vs. Owings.* This question therefore being open the defendant insists:

2nd. That the *special plea* of limitations by the defendant is a complete bar to the suit, and completely bars the complainant until he avers that the provisional trustee had been kept in ignorance of his right of action by the concealment and fraud of the defendant, and such averment could not in truth be made, because Hinkley, the provisional trustee, was himself one of the grantees in the deed of trust from which the complainant alleges that he first discovered the transfer assailed by the bill. The complainant is the permanent trustee and he has no independent right to sue, but a *derivative* one only, through the *provisional trustee.* The act of 1816, ch. 221, undoubtedly intended that the title to sue should be vested in the provisional trustee, but the legislature omitted to make him a *bonded officer.* This defect was remedied by the act of 1819, ch. 84, secs. 7 & 8. Then came the act of 1825, ch. 205, sec. 8, which requires a deed from the insolvent to the provisional trustee of *all his estate, both real and personal.* Then the act of 1829, ch. 208, sec. 3, which *vests* in the provisional trustee, when he has filed his bond, "all the estate, property, effects, rights and claims of the insolvent debtor," and enacts that his appointment and bonding "shall operate as an authority to such trustee or trustees to take possession, for the benefit of the creditors of such insolvent, of all property, estate and effects, books, papers, accounts, bonds, notes and evidences of debt of such insolvent, without the necessity of such insolvent's executing a deed thereof, and to entitle such trustee or trustees *to use all legal means for the recovery thereof.*" These various acts are all to be construed together, and they clearly intended to give the provisional trustee as full and ample powers to sue for and recover property fraudulently conveyed away by the insolvent, as to the permanent trustee. On this point see 5 *H. & J.*, 408, *Kennedy vs. Boggs.* 2 *Daniel's Ch. Pr.*, 739. 7 *G. & J.*, 20, 43, *Cole vs. Hebb.* 9 *Pick.*, 212, 246, 247, *Furnam vs. Brooks.* 9 *Greenlf.*, 131, *Cole vs. McGlathry.* 1 *Md. Rep.*, 471, 472,

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Waters vs. Dashiell. 2 *H. & G.*, 26, 27, 28, *Brown vs. Brice*, and *Act of* 1834, *ch.* 293, *sec.* 5. We therefore insist, that the *first plea* was a complete bar to the complainant's bill.

3rd. The questions arising upon the *second plea*, which was sustained by the court below, relate, 1st, to the form of the bill and its allegations. As to this the defendant insists, that the bill is simply one to vacate a transaction void by the insolvent laws, and only asking for an account and delivery of the balance as subordinate to that design. The case of *Alexander vs. Ghiselin* only decides, that all the property to which the insolvent had the *right of possession* was transferred to his trustee, but it never decided that property deposited as security, apart from all fraud, could be taken possession of by the trustee. The bill therefore does not properly seek relief upon this transfer as a *valid mortgage*. It asks that the preference may be *set aside* as *fraudulent*, and because it calls for an account it is said to be a bill to *redeem a mortgage*. In such a bill as that there would be a tender of the *debts due*, and a bill which sets up a *fraud* as the ground of relief cannot be *tortured* into a bill for the redemption of a *valid mortgage*. 22 *Eng. Ch. Rep.*, 257, 258, *Ferraby vs. Hobson*. *Ibid.*, 322, *Glascott vs. Lang*. 7 *Eng. Law & Eq. Rep.*, 259, 260, *Price vs. Berrington*. 2 *Rhode Island Rep.*, 129, 132, *Mt. Vernon Bank vs. Stone*. *Story's Eq. Pl.*, *secs.* 27, 36, 251, and *note* 2. 16 *Pet.*, 195, *Hobson vs. McArthur*. 6 *H. & J.*, 29, *Chalmers vs. Chambers*. 1 *Daniel's Ch. Pr.*, 412, (*note* 11,) 425, 426, 437, 438. This bill then is nothing but a bill to set aside an undue and improper preference under the act of 1834. All its allegations are to this point and it cannot, because it asks for an account, be treated as a bill for an account simply. The bill contains no charge that the transfer was fraudulent *at common law*. 2nd. But suppose the bill distinctly stated the three propositions:—1st, that the preference was fraudulent and ought to be set aside; 2nd, that the trustee was entitled to the funds in order for distribution, subject to liens and agreements to pay the defendant, and 3rd, that he was entitled to the surplus, treating the case as a mortgage, how then would

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the case stand? In such case the bill must advise the party of the alternative aspect of the case, so that he may answer, reply or plead. But no such case is presented by this bill, and if it was, the bill would still have been properly dismissed, because the purposes are wholly inconsistent and the double aspect would not help the case. 4 *G. & J.*, 444, *Burch vs. The State*. 6 *G. & J.*, 231, *State vs. Bank of Maryland*. *Ibid.*, 188, *Evans vs. Iglehart*. *Story's Eq. Pl., secs.* 245, 246, 249, 251, 254. 2 *Md. Rep.*, 37, *McElderry vs. Shipley*. 2 *H. & G.*, 41, *Lowry vs. Tiernan*. 17 *How.*, 143, 144, *Shields vs. Barrow*. 1 *Daniel's Ch. Pr.*, 463. *Acts of* 1816, *ch.* 221, *sec.* 6; 1812, *ch.* 77, *sec.* 1, and 1834, *ch.* 293. 7 *Gill*, 404, 405, *Gardner vs. Lewis*. 4 *Md. Rep.*, 360, 361, *Mayor & C. C. of Balto. vs. Norman*. If the assignee of a bankrupt deals with a party who has intermeddled with the assets, he waives the fraud and cannot treat him as a wrong-doer. 7 *Md. Rep.*, 272, *Lanahan vs. Latrobe*. 14 *Eng. C. L. Rep.*, 50, *Brewer vs. Sparrow*. 28 *Do.*, 29, *Campbell vs. Fleming*. See also on this point 6 *H. & J.*, 266, *Harding vs. Stevenson*. 12 *How.*, 83, *Harris vs. Runnels*. 1 *Pet.*, 43, 44, *Gaither vs. Farmers & Mechanics Bank*. *Chitty on Bills*, 82, 91. 2 *Pet.*, 539, *Bank of U. S. vs. Owens*. 7 *Gill*, 481, *Albert & Wife, vs. Winn & Ross*. 2 *Starkie on Ev.*, 478.

4th. There was adequate remedy *at law*, and therefore the bill was properly dismissed. The violation of a statute is *no fraud*. The act of 1834 merely says, that such transfers as were before its enactment *valid* shall be *void*. The trustee could clearly have maintained *trover* for the bonds, notes and goods transferred. Equity had therefore no jurisdiction in the case. 7 *G. & J.*, 170, *Dulaney vs. Hoffman*. 3 *Md. Rep.*, 383, *Hertle vs. McDonald*. 11 *G. & J.*, 443, 444, *Oliver vs. Palmer*. 7 *G. & J.*, 117, 120, *Adair vs. Winchester*. 1 *Story's Eq., secs.* 76, 79. 12 *Georgia Rep.*, 9, *Bowen vs. Johnson*. 9 *Metcalf*, 470, *Thayer vs. Smith*. 7 *Cushing*, 181, *Woodman vs. Saltonstall*. 8 *Ala. Rep.*, 743, *Knotts vs. Tarver*. 1 *Kelly*, 376, *McLaren vs. Steapp*. 12 *G. & J.*, 480, *Richardson vs. Stillinger*. 4 *H. & J.*, 46, *Taylor vs.*

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Ferguson. 1 *H. & G.*, 221, *Drury vs. Conner.* 2 *H. & G.*, 41, *Lowery vs. Tiernan.* 5 *Sandford*, 205, 207, *N. A. Fire Ins. Co. vs. Graham.* *Act of* 1801, *ch.* 74, *sec.* 6. The act of 1841, ch. 163, applies only to appeals by *defendants*, and therefore does not prevent this point from being considered in this case upon this appeal by the complainant.

5th. As to the question of limitations, the defendant insists that the general plea of limitations is a good bar. The creditors cannot pursue the property thus fraudulently as is alleged transferred. The trustee alone can do it. The plea of limitations then must be directed against him alone, and the question then is, when did the right of action accrue to him? The transfer being fraudulent it accrued *immediately* and the statute began to run from that time. The trustee's right to sue vested immediately upon his bonding, and the possession of the defendant from that moment as against him was *tortious*. As against this right of the trustee we plead the statute of limitations, and we say it is a flat bar. At law there are no exceptions to be engrafted upon the statute except those found in the act itself, of 1715, ch. 23. Nor is there any difference between a court of equity and a court of law in this respect. In cases of concurrent remedy equity *follows* and *obeys* the law. 3 *Md. Rep.*, 383, *Hertle vs. McDonald.* 6 *Md. Rep.*, 336, *McDowell vs. Goldsmith.* 3 *Gill*, 161, 164, *Dugan vs. Gittings.* 11 *G. & J.*, 372, *Abell vs. Harris.* 7 *Gill*, 76, *Sindall vs. Campbell.* 8 *Yerg.*, 241, *Walker vs. Smith.* 9 *Pick.*, 212, 246, 247, *Farnam vs. Brooks.* 5 *Barbour*, 393, *Bucklin vs. Ford.* 1 *Law Lib.*, 28, *Wilkinson on Limitations.* 1 *Gill*, 248, *Berry vs. Pierson.* 2 *G. & J.*, 310, *Watkins vs. Harwood.* 8 *G. & J.*, 468, *Planters Bank vs. Farmers Bank.* 2 *Daniel's Ch. Pr.*, 735, 736, 739. *Story's Eq. Pl.*, *secs.* 753, 754. *Chitty on Cont.*, 817. 24 *Wend.*, 602, 603, 606, 607, 608, *Humbert vs. Trinity Church.* 8 *Gill*, 331, *Negro Franklin vs. Waters.* 10 *G. & J.*, 225, *Tiernan vs. Rescaniere.* 5 *Mason*, 152, 153, 155, *Sherwood vs. Sutton.* 17 *Wend.*, 202, *Allen vs. Mille.* *Douglas*, 655, *Bree vs. Holbech.* 2 *Younge & Col.*, 58, *Brooksbank vs. Smith.* 1 *Story's Eq.*, *sec.* 78. 5 *Mees. & Wels.*, 117, *Browning vs.*

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Paris. 22 *Ala. Rep.*, 631, *Newcombe vs. Leavitt.* 26 *Eng. Law & Eq. Rep.*, 428, *Imperial Gas-light Co. vs. London Gas-light Co.*

6th. The next question is, has the amended bill made any difference in the case? We say it has not, because fraud or ignorance makes no defence in cases where the remedy is concurrent at law and in equity. The question simply is, did a right of action accrue or exist for three years before the filing of the bill. If the amendment avails any thing, it changes the case to one of *exclusive* jurisdiction *in equity*, and this cannot be done by *amendment*, for it in effect makes a new case. 17 *How.*, 144, *Shields vs. Barrow.* 10 *Pick.*, 128, *Pratt vs. Bacon.* 1 *Eng. Cond. Ch. Rep.*, 323, *Taylor vs. Shaw.* 22 *Do.*, 408, 409, 410, *Watts vs. Hyde.* 7 *How.*, 828, *Stearns vs. Paige.* 4 *Paige*, 538, *Lloyd vs. Brewster.* 1 *Johns. Ch. Rep.*, 187, *Lyon vs. Talmadge.* 3 *Do.*, 423, *Shephard vs. Merrill.* 14 *Pet.*, 160, *Walden vs. Bodley.* 16 *Wend.*, 476, 477, *McCrea vs. Purmort.* 5 *Mason*, 112, 113, *Pratt vs. Northam.* But the amendment at last brings the case to a simple one of *ignorance of rights*, which is no bar to the running of the statute. It is simply a sheer case of ignorance on the part of the complainant, without any fraud or concealment on the part of the defendant. In such cases *ignorance* is no bar to the plea of limitations. 11 *G. & J.*, 372, *Abell vs. Harris.* 24 *Wend.*, 605, 606, *Humbert vs. Trinity Church.* 2 *Jac. & Walk.*, 139, 142, *Cholmondeley vs. Clinton.* 1 *Eng. Law & Eq. Rep.*, 48, 49, *East India Co. vs. Paul.* In those States where fraud is held a good reply to the plea of limitations, it is held that the fraud must be the fraud of the *defendant.* 3 *Greenlf's Rep.*, 405, *Bishop vs. Little.* 9 *Do.*, 131, *Cole vs. McGlathry.* If this be so the statute will run down to the time of the filing of the amendment introducing new matter. 3 *Iredell's Ch. Rep.*, 535, 542, 543, *Christmas vs. Mitchell.* 1 *McLean*, 85, 86, *Miller vs. McIntire.* 1 *Daniel Ch. Pr.*, 455, *and notes. Douglas*, 655, *Bree vs. Holbech.* 2 *Md. Ch. Dec.*, 391, *McDowell vs. Goldsmith.* We therefore insist:—1st, that the complainant should not have been allowed to amend his bill as he did

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after *hearing* of the pleas of the defendant; 2nd, that the amendment was not sufficient in law after the pleas filed by the defendant; and 3rd, that, at all events, the amendment extended the limitation down to the time of applying therefor, on the 14th of February 1853.

7th. That the pleas were not too wide and did not need the support of an answer, see *Story's Eq. Pl., secs.* 751, 753, 754. 1 *Daniel's Ch. Pr.*, 598, *note* 2. 6 *Pet.*, 326, *New Jersey vs. New York.* 8 *How.*, 222, *Maxwell vs. Kennedy.*

Mason, J., delivered the opinion of this court.

Many grave and important questions have been discussed with much ability by counsel in the progress of their argument, which we think the exigencies of this case do not require us to determine upon the present appeal.

Whatever force there would have been in the suggestion, if made at the proper time, that a court of equity had no original jurisdiction over this case, it is now too late for us to entertain such an objection, inasmuch as none was taken, as required by the act of 1841, chap. 163, in the court below. By that act it is provided, that the defendant shall not, in the Court of Appeals, rely upon any objection to the jurisdiction of the court below, unless it appear by the record, that such objection was raised below.

The appellant as permanent trustee in insolvency of Carey, Wethered and O'Donnell, on the 8th of December 1850, filed his bill in equity, making substantially the following case: that the firm above named became embarrassed in 1839; and being absolutely insolvent in the following year, with full knowledge of their condition, transferred large sums of money and other property, constituting nearly the whole assets of the firm, to several preferred creditors. That Gibson, the defendant, received of such assets more than $18,000, which sum exceeded his claim against the firm, and his liabilities for them; that at the time of the said transfer the firm was utterly insolvent, and Gibson knew of such condition; that the several members of the firm applied for the benefit of the insolvent laws in 1841, and that the appellant became permanent trustee for all the parties, on the 23rd of October 1846; that Gibson

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has never accounted for any of the assets which came into his hands, &c.

Subsequently, by an amended bill, it was further alleged, that after the assignment to Gibson the insolvents made a deed to Hinkley and Woodward, dated September 24th, 1840, embracing the balance of their assets and property, and under which deed the grantees took possession of the books and papers of the firm. Upon a bill filed in equity by the permanent trustee to vacate this deed, a decree was passed 12th of July 1848, vacating the deed and transferring the property, books and papers of the insolvent, embraced by said deed, to the trustee. From these books he discovered, for the first time, the transfers above mentioned to the present defendant, and that he had no other means of ascertaining the fact. The prayers of the bill were for a discovery, an account, and for a delivery of the assets in the defendant's possession to the complainant, and for general relief, &c.

The defendant pleaded two pleas of limitation, namely:

1. That Hinkley was appointed provisional trustee of Carey on the 12th of January 1841; and of Wethered on the 13th of August 1841; and Horsey became provisional trustee of O'Donnell on the 13th of July 1841; and that the cause of action accrued to Hinkley, as provisional trustee of Carey, Wethered & Co.; and to Horsey, as provisional trustee of O'Donnell, more than three years before *bill filed*, or before *serving or suing* out process, and also more than three years before the appointment of complainant as permanent trustee; nor did the defendant promise within three years before *bill filed*, or process *served* or *issued*, nor either when or since the provisional trustees were in office, to account or make satisfaction for any matters in the bill.

2. That the cause of action accrued to the complainant more than three years before bill filed, or before serving or suing out process; and defendant did not promise complainant to account for, or pay any thing for any matter charged in the bill.

The court overruled the *first* and sustained the *second* plea, and dismissed the bill. Both parties it seems appealed from this decision.

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Without inquiring into the regularity of the appeal of the defendant, because of the circumstance that the decree was in his favor, the court is nevertheless of opinion, that all the advantages which he seeks under his appeal can be attained under the complainant's appeal. The question presented upon the appeal regularly before us is, whether the decree dismissing the bill was properly passed? and if either of the defendant's pleas presents a good ground of defence to the case as made by the complainant's bill, the decree must be affirmed, and it matters not upon which plea the court below based the dismissal of the bill.

The *second plea*, in its connection with the amended bill, raises the question, in addition to the question of the general inapplicability of either plea to this particular transaction, whether the three years' limitation began to run from the appointment and qualification of the permanent trustee, or from the time the fact of the alleged fraudulent transfer to Gibson came to his knowledge? This is a most important question, and one by no means free from difficulty, but as it does not enter into the first plea, and as the court have no difficulty in determining that that plea was improperly overruled, we are relieved from the necessity of deciding the question upon this appeal.

It is not charged in the bill that the provisional trustees had no knowledge of this alleged fraudulent transaction. Indeed such a theory is expressly negatived by the fact that Hinkley, who was the provisional trustee of two of the three insolvents, was also one of the grantees of the deed, under which the possession of the books and papers of the insolvent firm passed to him, and from which knowledge of the transfer was to be acquired.

The two remaining questions presented by the first plea, which we are required to determine, are, first, does the present proceeding disclose such a transaction or trust to which the plea of limitations would be inapplicable? and if not, then, secondly, does the insolvent system of Baltimore city confer power upon the provisional trustee to sue in such a case as the present, and thereby bring him and the creditors he represents

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within the operation of the statute of limitations, which statute begins to run from the time the cause of action accrued, provided there is no disability existing at the time in the party entitled to sue?

It is certain upon the facts disclosed by the bill, that an action or actions at law would have been maintained by which the relief now sought could have been fully secured, whether equity possesses concurrent jurisdiction or not. This being conceded, it has been settled by this court, that in all cases of concurrent jurisdiction, between courts of law and equity, the statute of limitations is equally obligatory in each court. *Watkins vs. Harwood*, 2 *G. & J.*, 307. *Dugan vs. Gittings*, 3 *Gill*, 161. *Hertle vs. Schwartze*, 3 *Md. Rep.*, 383.

We think this principle disposes of the first objection taken to this plea of limitations.

Next, as to the second point, namely, the right of the provisional trustee to sue. True it is, that the case of *Kennedy vs. Boggs*, 5 *H. & G.*, 403, expressly decided, that the act of 1816, chap. 221, the act under which the local system of insolvency for Baltimore city was created, did not confer any power upon the provisional trustee to sue for the recovery of the property of the insolvent from third parties, and if the legislation upon this subject had rested here, we would have had no difficulty in sustaining the views of the appellant upon this point. But to meet a case like the present it would seem that the act of 1829, chap. 208, was enacted. By the third section of that act, in express terms, the right to the possession of all the property, &c., of the insolvent, is conferred upon the provisional trustee, with power "to use all legal means for the recovery thereof." Under this act there is no room to doubt that there was full power in the provisional trustees to sue in this case as fully as the permanent trustee, and that limitations began to run against them from the time of their appointment and qualification as such, and when once commenced limitations continued to run against, also, the permanent trustee.

For the reasons assigned we regard the plea of limitations as a flat bar to a recovery in this proceeding, and therefore affirm the decree.

Decree affirmed.

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STATE, use of DANIEL C. SPRIGG, *vs.* MARY J. JONES and others.

The act of 1720, ch. 24, which prohibits a suit upon a testamentary or administration bond, before a return of *non est* to a *capias* against the executor or administrator, is a *remedial statute*, and, as such, is to be *liberally* construed; its design is to make the principal pay instead of the surety.

Under this act an executor may *voluntarily* appear to the *capias* at any time during the *same term*, though after the return of *non est*, and thus prevent a suit on his bond.

The return of *non est* gives the right to sue the bond, and if such suit be brought *before* an appearance by the executor, a *subsequent* appearance by him cannot arrest it.

The clerk of a court has no right to receive an appearance to a suit and make an entry thereof when the court is not in session.

Where a defendant relies upon an appearance in another case in another court as having been properly entered, the plaintiff cannot reply and aver against the record that the appearance was not properly entered.

APPEAL from the Superior Court for Baltimore city.

Debt brought on the 28th of August 1852, by the appellant, on the testamentary bond of Mary Jane Jones, as executrix of Andrew D. Jones.

The *declaration* sets out as a breach, that Andrew D. Jones was one of the sureties in the guardian's bond of Samuel Jones, Jr., who received a large sum of money belonging to his ward which he failed to pay over to the plaintiff, Sprigg, (who was subsequently appointed guardian in the place of said Samuel Jones, Jr.,) as directed by the orphans court; that on the 10th of April 1852, after the death of Andrew D. Jones, the plaintiff sued out of the circuit court for Baltimore county, in which she resided, a writ of *capias ad respondendum* against the said Mary Jane Jones, his executrix, to recover this money, returnable on the 3rd Monday of April 1852, which was returned "*non est*," wherefore a right of action on her testamentary bond accrued to the plaintiff.

The defendants *pleaded*, that while they admit all the matters and things averred in the declaration, yet they say that after the return of the writ of *capias ad respondendum non est* as against the said Mary J. Jones, she duly appeared

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in said court to answer it, to wit, on the 2nd of August 1852, being during the same term of the court to which the writ was returnable, and afterwards, on the 12th of August 1852, at the same term, filed her *plea* to the declaration, of all which the plaintiff had notice; to which plea the plaintiff, on the 30th of November 1852, *replied*, and that said case upon these pleadings is now pending in the said circuit court for Baltimore county.

To this plea the plaintiff *replied*, that said circuit court, after the said return of *non est*, to wit, on the 14th of July 1852, adjourned till the 27th of October 1852, and held no session upon any day between the said 14th of July and the 27th of October 1852, and that after said adjournment and before the day appointed for the session of said court, to wit, on the 2nd of August 1852, the said court not being in session, the said Mary Jane Jones, by her attorney, caused her voluntary appearance to said writ so returned *non est* to be entered on the docket in the clerk's office of said court; and at another day during said adjournment, to wit, on the 12th of August 1852, she, by her attorney, caused to be entered on said docket in said clerk's office the filing of her plea in said suit, and then and there left in the clerk's office the paper called a plea in said cause, and on the 28th of August 1852, the plaintiff sued out of the Superior Court of Baltimore city the writ in this suit and filed the declaration therein, *absque hoc*, that said Mary Jane Jones duly appeared in said circuit court to said writ of *capias ad respondendum* as alleged in her plea.

To this replication the defendants *demurred* generally, which demurrer the court, (FRICK, J.,) sustained, and gave judgment thereon for defendants, from which the plaintiff appealed.

The cause was argued before LE GRAND, C. J., TUCK and MASON, J.

Richard T. Merrick for the appellant, argued:

1st. That the act of 1720, ch. 24, subjects the plaintiff's absolute right to sue on the bond to only one condition precedent. He is required to issue a *capias* against the personal

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representative in the county of her residence or where letters have been granted, and *on the return* of *non est* the right to sue the bond *is absolute*, and no subsequent appearance, voluntary or in pursuance of an *alias*, can divest the right to proceed against the sureties on the bond. This act is in derogation of the common law, and, like all such legislation, is to be construed *strictly*. Prior to this law a creditor had the right to sue the bond. This law says he shall not sue until a return of *non est* to a *capias* against the executor. Upon the simple return of *non est* the creditor is *restored* to his common law right and cannot be divested thereof by any subsequent condition. A writ is said to be returned when it is returned to the place whence it issued. *Evan's Pr.*, 86.

2nd. If a voluntary appearance could divest this right, there was and could be no appearance *except in court*, and while it was in session, and the appearance alleged is one in the *clerk's office* during an adjournment, and *this suit* was brought before the court again met. Any appearance to be valid must be in *open court*, in order that the party may be required to *give bail* and *security for costs*. *Evan's Pr.*, 244, 245, 266, 267. There is an analogy between this case and that of fixing bail, which is regarded as fixed on the day of the return of *non est*, and if released it must be done in open court. *Evan's Pr.*, 266. On this point see also 1 *H. & J.*, 453, *West vs. Hughes.* 1 *Tidd's Pr.*, 238, 239. 1 *Salk.*, 8, *Stroud vs. Gerrard.* *Cro. Eliz.*, 466, *Corbet vs. Cook.*

3rd. The fact that the plaintiff filed a replication to the plea in the suit in the circuit court, being *after this suit*, cannot affect it, nor could it relate back, but can only be regarded as the acceptance of a *voluntary* appearance as of its date.

4th. That this is properly a case for a *special* traverse. All the authorities say that a record may be questioned by a record. 3 *Bac. Abr.*, 371. It is the very case for a special traverse, for in no other way could the question *of law be raised.*

Benjamin C. Barroll for the appellees, argued:

1st. That the demurrer was properly sustained, because the executrix appeared in the circuit court and pleaded to the *nar*

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against her, and that court recognised her appearance by receiving and retaining her plea. The plaintiff also recognised her appearance and plea by the replication thereto, and having done so it is too late in the suit on her bond to say that the appearance and plea are nullities. The act of 1720 was intended to apply to a case in which the executrix does not in fact appear to the suit. If she appears and pleads, and gives the plaintiff notice, and he replies to her plea, such a case is within the reason and spirit of the act. *Stephen on Plead.*, 22 to 26. The act never designed that a plaintiff should at the same time prosecute his claim against an executrix and also against her bond. The basis of the right to prosecute the bond is the inability to prosecute the original debtor. This act is for the remedy of a mischief and is to be construed according to its spirit and design, and not according to its letter. 2 *G. & J.*, 365, *State vs. Boyd.* 4 *G. & J.*, 152, *Canal Co. vs. Rail Road Co.* 1 *Md. Rep.*, 17, *Milburn vs. The State.* The authority cited on the other side from *Evan's Pr.*, 266, is overruled by the case of *Dunbar vs. Conway*, 11 *G. & J.*, 94. The appearance here was properly entered. 1 *Tidd.*, 264. *Stephen's Plead.*, 25. In 2 *Smith's Lead. Cases*, 512, the very point was made that the court was not in session, and was overruled.

2nd. The replication or special traverse in this case is not well pleaded; you cannot aver against the record, you are estopped from so doing. *Stephen's Plead.*, 181. 1 *Chitty's Pl.*, 618, 619. 2 *Strange*, 684, *Helbut vs. Held. Ibid.*, 817, *Palmer vs. Elkins.* 1 *Wilson*, 85, *Bradburn vs. Taylor.* 16 *Johns.*, 55, *Green vs. Ovington.* 3 *Bac. Abr.*, 370 to 374, title, *Error.* 2 *Smith's Lead. Cases*, 512.

Le Grand, C. J., delivered the opinion of this court.

This is an appeal from the decision of the Superior Court of Baltimore city, sustaining the demurrer of the appellee to the replication of the appellant to the plea of the appellee, under the following circumstances:

This proceeding commenced under the act of 1720, chapter 24, entitled, "An act to *restrain* the *rigor* of prosecutions on

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administration or testamentary bonds." As the act is short, we incorporate it, that our opinion may the more distinctly appear. Its preamble and enactment are, as follows:

"Whereas it is represented by some of the justices of the provincial court, that a *most oppressive* and *pernicious* practice is introduced of putting testamentary and administration bonds in suit in the provincial court for the non-payment of small debts recovered in the county courts, without ever suing out writs of *fieri facias* or other executions to affect the estate of the deceased in the executors' or administrators' hands, OR without any insufficiency of such executors or administrators, whereby the act, entitled, an act to restrain the ill practices used by sheriffs in taking goods by *fieri facias* and selling them by *venditioni exponas*, is entirely evaded so far as it relates to executors and administrators, and the person and sureties of such executors and administrators are affected by such suing the said bonds, *instead* of the effects of the deceased; for prevention whereof for the future:

"Be it enacted," &c., &c., "That it shall not be lawful for any creditor or creditors to prosecute any such administration or testamentary bond for any debt or damages due from or recovered against any testator or intestate, or their effects, before a *non est inventus* on a *capias ad respondendum* be returned against the executor or administrator, or a *fieri facias* returned *nulla bona* by the sheriff of the county where such executor or administrator lives, or where the effects of such deceased lies, or such other apparent insolvency or insufficiency of the person or effects of such executor or administrator, as shall, in the judgment of the provincial court that hears the cause, render such creditors remediless by any other reasonable means save that of suing such bonds, on pain that such person or persons that shall cause such bonds to be sued contrary to the true intent and meaning of such act, shall be condemned in full costs of suits, to be adjudged by such provincial court to the defendant or defendants that shall be so sued, against the person or persons that shall cause the same to be sued, and shall award execution thereof as usual in other cases.

"And be it further enacted, as aforesaid, That it shall and

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may be lawful for the defendant or defendants in such suits to give this act and the special matter in evidence without specially pleading the same; any law, statute, usage or custom to the contrary notwithstanding."

The plaintiff in this action, on the 28th of August 1852, commenced an action of debt, in the Superior Court of Baltimore city, against the defendants, upon the testamentary bond of Mary J. Jones, executrix of Andrew D. Jones. The declaration is in the usual form, setting out the breaches. The defendants pleaded specially, *substantially* as follows: that whilst they admit the matters and things charged and averred against them in the declaration, they say, that after the return of the writ of *capias ad respondendum* "*non est*" as against Mary J. Jones, by the sheriff of Baltimore county, as alleged in said declaration, the said Mary Jane Jones duly appeared in the said court to which the said writ was made returnable, and at the same term thereof, to wit, on the 12th day of August, the said Mary filed her plea to the said declaration, of all which plaintiff had notice, and afterwards, on the 30th day of November 1852, filed its replication to the plea, and that the case, on such pleading, is now pending, &c. To which plea the plaintiff replied, that after the return of "*non est*," on the 14th day of July 1852, the court adjourned until the 27th day of October of the same year, and when the appearance and plea of the defendant, Mary J. Jones, was made, the said court was not in session. To this replication the defendants demurred and the court sustained the demurrer, from which decision is this appeal.

On behalf of the appellant it is contended, that a return of "*non est*" as against an administrator, under the act of 1720, *ipso facto*, gives the right, *never thereafter to be questioned*, to sue the administration bond. In this opinion we do not concur. In the case brought to our view by the pleadings in this one, it appears, that although Mary J. Jones had been returned *non est*, nevertheless she appeared at the *same term* and pleaded, and that her plea was replied to by the plaintiff in this action, and that the suit is still depending.

Apart from all considerations growing out of the general

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law, we think, under the act of 1720 itself, the appellant has clearly no case. That act was designed, if there ever was one, as a *remedial* statute, and as such ought to be *liberally* construed. It was passed—to use its language—to do away with a "*most oppressive* and *pernicious* practice;" in other words, to prevent the property of sureties being taken to satisfy the debts of the principal, when such principal had sufficient property to satisfy them. And although it authorises the institution of a suit against the sureties on a testamentary bond after the return of a *non est* against the administrator, it does not, therefore, necessarily follow, that the administrator cannot appear *voluntarily* in the court to which the writ is returnable *during the term*, or on the same day, but at a later hour of that day, on which the sheriff makes his return.

Before the adoption of the present constitution of the State it was the uniform practice of sheriffs to have their amercements stricken out when the party was produced, if at any time during the term. It was all the party had a right to demand. The body of the defendant was produced to answer. And surely under a proceeding commenced under an act passed to "*restrain*" the "*rigor*" of proceedings, it is not, and cannot be a too liberal construction, to allow to sureties the privilege which would have been granted to the principal. The purpose of the act is transparent. It is nothing more than this: *to make the principal pay instead of the surety.* In the case before us the appellant is in no way damaged. Had Mrs. Jones been returned "summoned" on the first day of the term to which the *capias* was returnable, instead of *non est*, the appellant would be in no better condition than it is now—her appearance during the term, and pleading, and its replication, gives to the State all the advantage which either justice or a fair construction of the act of Assembly entitles it. A reference to the authorities cited in argument would show conclusively, that the appearance of Mrs. Jones was in sufficient time. We have forborne to notice them, because the very act under which this proceeding is professedly had, is too plain, in our opinion, to admit of a serious controversy as to its true meaning, liberal and *just* spirit.

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The replication relies on the fact that Mary J. Jones appeared to the suit against her at a time when the court was not only not in session, but had adjourned from a day preceding to one succeeding the entry of the appearance. We do not think such an appearance can be entered. The clerk has no power to receive the appearance and make the entry when the court is not in session. But if there was any such irregularity it should have been corrected by a proper proceeding in that case. The defendant relies on the appearance having been properly entered, and the plaintiff cannot, as we think, aver against the record. Although the defendant may appear voluntarily, yet if the suit on the bond shall be commenced before the appearance is entered the plaintiff cannot be thereby barred of its right to prosecute that suit. The return of *non est* gives the right to sue the bond, and when that writ is issued the appearance cannot arrest the proceeding.

Judgment affirmed.

Mayor and City Council of Baltimore, Garn. of John T. Brashears, *vs.* Basil Root, use of James Armstrong.

Funds in the hands of the register of the city of Baltimore due by the city for the salaries of city officers, are not, upon grounds of *public policy and convenience*, liable to be *attached* by the creditors of such officers.

Municipal corporations are parts of the *State government* exercising delegated *political* powers for *public purposes*, and the rule exempting funds in the hands of one *State officer* due another from attachment, applies equally to the officers of such corporations.

The members and officers of public municipal corporations are officers of the government for the administration or discharge of public duties.

The act of 1825, ch. 114, sec. 2, authorising attachments on judgments to be laid in the hands of any "person or persons whatever, *corporate or sole*," does not include *municipal corporations;* they are *excepted* by reason and necessity.

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Mayor & C. C. of Balto., Garn. of Brashears, *vs.* Root.

In construing statutes, the *intention* of the makers must be regarded, and what is within such intention is within the statute though not within the letter, and what is within the letter but not within the intention is not within the statute.

The fact that the officer whose salary was attached could have *sued the city* therefor, does not authorize his creditor to *attach* the claim.

Because a claimant may sue, it does not follow that his creditor can *attach* the claim in *every case*, although as a *general rule* it may be so.

APPEAL from the Superior Court for Baltimore city.

Attachment on a judgment against Brashears at the suit of Root, laid in the hands of J. J. Graves, register of the city of Baltimore. It was admitted, that at the time of trial there were in the hands of the register funds of the corporation due Brashears, for services as a police officer of said city, sufficient to pay the judgment upon which the attachment issued. The court below, (FRICK, J.,) sustained the attachment, and from that judgment the garnishee appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

Grafton L. Dulany and *Benjamin C. Presstman* for the appellant, argued, that the judgment below was erroneous, because the wages or salary of a public officer in the hands of the disbursing agent of a municipal corporation are not attachable in law. 3 *How.*, 550, *State of Maryland vs. Balto. & Ohio Rail Road Co.* 12 *G. & J.*, 438, *State, use of Washington County, vs. Balto. & Ohio Rail Road Co.* 9 *Wheat.*, 738, *Osborn vs. United States Bank.* 13 *Pet.*, 499, *Wilcox vs. Jackson.* 7 *Monroe*, 444, *Divine vs. Harvie.* 7 *Mass.*, 259, *Chialy, et al., vs. Brown*, 3 *Barr.*, 368, *Bulkley vs. Eckhert, et al.* These cases show that it is a well settled principle, that those who exercise *sovereign authority* cannot be impeded and obstructed in the discharge of their duties, by attachments laid in their hands by the creditors of the parties to whom they are to disburse salaries or funds for public services. The public interests would be injured by such an invasion of the duties of public officers, who are created and

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exist solely for the *public*. The great doctrine in all such cases is that of *inconvenience*, and the cases go upon the ground, that if such attachments were allowed, they would hinder and delay the successful operations of government. Our attachment laws do not say that they shall extend to *municipal corporations*, and they are exempted unless there is a special clause embracing them.

T. Yates Walsh for the appellee. Are the wages of a police officer of the city of Baltimore liable to be attached to enforce the payment of his debts? The affirmative of this proposition it is my duty and purpose now to maintain. And first, let us remark, that this officer could have *sued* the corporation for these wages if they had been withheld. The whole argument on the other side proceeds upon the theory, that the *sovereignty* of the city exempts her from the process of attachment, and yet the admission is, that Brashears, her *subordinate*, could have brought her before the court and recovered judgment for his claim. She cannot assume *the purple* for her own protection, but is to be allowed to throw it as a *shield* around the person of an unjust debtor. Such is the gross inconsistency involved in the argument on the other side.

I maintain, on the *contrary*, that *whenever* the original debtor can be *sued* by the *original party*, such *debtor is liable to the process of attachment*. The cases cited on the other side do not at all militate against this *position*. The cases in 13 *Pet.* and 9 *Wheat.* establish but *this*, that the funds in the hands of the agents of the federal government are *in fact in the possession of the government*. That government cannot be *invoked* to *litigation* by any contractor with whom she has dealt, and therefore she cannot be forced to assume the relation of a suitor by any third party claiming such contractor's rights. The case in 7 *Mass.* seems *directly to concede*, that if there was a right of *suit* by the garnishee against the trustee, the claim *would be liable to the trustee's process*. In the case in 3 *Barr.*, the money was in the hands of the commissioners as agents of the *State*, and the teacher himself could have brought no suit for it. No *authority* can be found for the

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assertion, that where there is a right of action by an original *claimant* against a *debtor*, such debtor cannot be made a garnishee in attachment. The *sovereign* can never be brought into *his own courts;* and money in the hands of a *sheriff* or other executive officer cannot be attached. The reasons of the first proposition are sufficiently obvious, and those of the other are well expressed by the Court of Appeals, in the case of *Farmers Bank of Delaware vs. Beaston*, 7 *G. & J.*, 424 and 428, where the court distinctly intimate, that the exemption of the funds in the hands of the sheriff is because they are *in fact* and *in law* under the *protection of the court.*

But it seems to me hardly necessary in this case to rely upon any thing save the *charter*, the *organic law* of the *city of Baltimore*. By a reference to this, we may avoid the necessity of deciding upon the rights resulting from the *division* and delegation of sovereignties. The *State* might, by its organic *law*, and it may be said by an act of ordinary legislation, allow *itself to be sued.* And if so, all the *incidents* attaching to a defendant would belong to her new relation. It was clearly competent for the legislature, when the charter was given to the city of Baltimore, to *qualify* the sovereign powers, which, for the sake of the argument, I admit were conferred upon her. And what was the qualification? Baltimore town is erected into a city by the name of the *city of Baltimore*, and the inhabitants thereof constituted a body *politic and corporate* by the name of the Mayor and City Council of Baltimore, and as *such*, shall have perpetual *succession*, and by their *corporate name* may *sue and be sued, implead and be impleaded*, grant, receive and do *all other acts* as *natural persons*. Now in this connection, let us look to the attachment law of 1825, ch. 114, sec. 2, allowing attachments on *judgments* to be issued against the goods, chattels and credits of the defendant in the hands of the *plaintiff*, or in the hands of *any other* person or persons, *corporate or sole*. Now how can any considerations of public *policy* at the hands of the *judiciary* interfere with the force of language like this? The act of 1795, ch. 56, did not by terms extend to *corporations*. The language of the Court of Appeals, in *Somerville vs. Brown*, 5 *Gill*, 420, seems to establish

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the principle, that the terms of the *statutes relating* to attachments are to be *strictly enforced.* Judge Dorsey, in that case, says, "in rendering credits the subject of attachment, all that the legislature designed to effect thereby in a case like the present was, to substitute as it were the attaching creditor to the rights of his debtor creditor, and to enable the former to recover that which the latter would have been entitled to recover had no attachment been issued." And again, "the design of the act of Assembly was simply to provide the means by which the attaching creditor could as effectually recover the credit as could the debtor creditor had no attachment been interposed." The majority of the court declare in that case, in effect, that the attachment binds every description of debt. What was the salary of this police officer? A debt. Was the money in the hands of a party liable to be sued? Most clearly. The legislature who passed the act of 1825 well knew the character of all the corporations that had been brought into existence by the State. They make no exception, and it is not, I humbly submit, for the courts under any plea of public policy *to add to their language.* Considerations of public *policy* are not for the courts but for the legislative branch of the government. The debt due by Brashears, I have a right to insist, was founded upon moral and legal considerations. I have a right to infer it was due for services and assistance necessary for his comfort, if not for his *livelihood.* All debts are presumed to be contracted under circumstances which call for payment at the hands of honest men. And when these considerations of public policy, as they are called, are pressed before the proper department, its constituents will hesitate long before giving immunity to fraud against the rights of the confiding creditor.

ECCLESTON, J., delivered the opinion of this court.

The present attachment was laid in the hands of J. J. Graves, the city register, who, at the time, as register, held money due by the Mayor and City Council of Baltimore to Brashears, the defendant, for his salary as a police officer. The judgment below sustained the attachment, and whether that decision is correct or not is the question for our consideration.

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It has been repeatedly held, that money due by the government to its officers or agents for services rendered by them as such, whilst it remains in the hands of the government or in the keeping of its disbursing agents, is not liable to be attached or seized by the creditors of those having such claims upon the government. This is certainly true in regard to those who hold appointments directly from State authority. The opposite theory would be calculated to produce serious interruptions in the course of public business, and hinder and delay, if not entirely prevent, in some instances, the accomplishment of very important measures, depending for their successful termination upon the prompt and regular supply of the funds on which the officers or agents have to rely. Whilst treating of this subject in *Divine vs. Harvie, 7 Monroe's Rep.*, 444, the court say:

"It would be a mortifying circumstance to see a member of the legislature rendered unable to pay his sustenance, while attending on its session, because a creditor, who never dealt on the credit of the fund, should, by injunction, detain his compensation, on which he obtained credit with his host."

In *Chidley et al., vs. Brewer & Trustee, 7 Mass. Rep.*, 259, the treasurer of the county held $21.25, which was due to Brewer for services rendered by him as a juror. Under a statute of the State the plaintiffs made an effort to have this money applied to the satisfaction of their claim against Brewer; insisting that the treasurer was to be considered as his trustee under the statute. But the court held, that a public officer having money in hand to pay a demand, which one has on him merely as a public officer, cannot, for that cause, be adjudged his trustee. And the court say, "A contrary decision would be mischievous, as will appear from this single consideration: that it would suspend, during the pendency of an action, a possibility of settling the accounts of the officer, who should be summoned as the trustee; and it may be added, that it would unreasonably compel him to attend courts in every county in the commonwealth to answer interrogatories."

In *Bulkley vs. Eckert et al.* 3 *Barr's Penn. Rep.*, 368, Bulkley had a judgment against Ulp and Eckert, on which

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an attachment issued. This writ was laid in the hands of J. Paul, who being a school director of a township in the county, and treasurer of the board of school directors, had in his custody, as treasurer, the public money to be applied to the support of the schools in the township. Ulp, one of the defendants, had been a teacher in one of these schools, and for his services as such there was money due him, but neither of the defendants had any other claim upon the garnishee. The decision in both courts was adverse to the claim of the attaching creditor, upon the ground that money in the hands of the treasurer, in his official character, could not be legally attached. The appellate court speak of his situation as being similar to that of a sheriff or prothonotary, having money in his hands as a public officer, which has been determined not to be subject to the process of attachment. The injurious effects upon the regular arrangement and administration of public business, by allowing such funds to be attached, are well described by Mr. Justice Sergeant, who, in delivering the opinion of the court says, "Great public inconvenience would ensue if money could be thus arrested in the hands of officers, and they be made liable to all the delay, embarrassment and trouble that would ensue from being stopped in the routine of their business, compelled to appear in court, employ counsel, and answer interrogatories, as well as take care that the proceedings are regularly carried on, and bail to return duly given. If a precedent of this kind were set there seems no reason why the State or county treasurer, or other fiscal officers of the commonwealth, or of municipal bodies, may not be subjected to the levying of attachments, which has never been attempted nor supposed to come within the attachment law. We do not, therefore, think this is such a debt as is contemplated by that law."

We do not understand the counsel for the appellee as contending that money due to a State officer for services, whilst it remains in the custody of a fiscal agent or officer of the State, can be attached. If the law will not permit it to be done in such a case, what good reason is there in support of such a principle, which does not also apply with perfect propriety to

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county officers and those of municipal corporations? City charters are granted by the legislature for the purpose of carrying on the machinery of government within certain limits. And the power conferred in them to appoint fiscal agents and police officers, and to provide compensation for their services, are essentially necessary for carrying into effect the object and design of such charters as create corporate powers, which are, in reality, but branches of the State government having delegated limited authority. Chancellor Kent says, on page 275 of the *2nd Vol.* of his *Commentaries:* "Public corporations are such as are created by the government for political purposes, as counties, cities, towns and villages, and the whole interest in them belongs to the public." In the *Regents of the University of Maryland vs. Williams*, 9 *G. & J.*, 397, the court say: "A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the legislature, and its members, officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns," &c. And again it is said: "The corporation of the University has none of the characteristics of a public corporation. It is not a municipal corporation. It was not created for political purposes, and is invested with no political powers. It is not an instrument of the government created for its own uses, nor are its members officers of the government, or subject to its control in the due management of its affairs."

As municipal corporations are parts of the State government exercising delegated political powers, for public purposes, the rule which prevents an attachment from being levied upon a claim of one State officer on funds in the hands of another, applicable to its payment, must apply with equal force to a case like the present. If an argument against the right to attach, based upon inconvenience, can have an influence in any case, it surely should do so where the officers of a large city are, necessarily, very numerous.

The appellee's counsel, however, contends that the attach-

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ment is clearly authorised by the act of 1825, ch, 114, sec. 2, which provides for an attachment against the goods, chattels and credits of a defendant in a judgment, "in the hands of the plaintiff, or in the hands of any other person or persons whatever, corporate or sole." This he thinks renders not only private corporations, but those of a public municipal character also, liable to such process. But we do not agree with him. There is no necessity to give such a construction for the purpose of giving effect to the law, as there are institutions on which it may operate, without carrying it to the extent insisted upon by the appellee.

The argument from inconvenience, which, exclusive of the act, prohibits or denies the right of attachment, we think will sanction the construction that the legislature did not design to include municipal corporations. Although the language of the law of Kentucky, which was under consideration in *Divine vs. Harvie*, is very general and comprehensive, yet its general terms were not considered sufficient to entitle a creditor of an officer or employee of the State to demand payment of his claim out of a sum of money allowed the employee in the ordinary appropriation bill. There the public inconvenience exerted considerable influence upon the decision.

In *Chialey, et al., vs. Brewer & Trustee*, the court were called on to construe a statute under which the plaintiffs sought to enforce the payment of their claim against Brewer, by demanding payment of the county treasurer out of money in his hands due to Brewer as a juror. There the injury to the public arising from sustaining such a proceeding is referred to as worthy of much consideration by the court in giving an interpretation to the statute.

In Pennsylvania the law relative to domestic attachments, passed in 1807, by its 2nd section, provides, that the officer to whom the process is directed "shall attach all the lands, goods, chattels and effects of the defendant or defendants, in whose hands soever the same can be found." And the act passed in 1836, on the same subject, prescribes the form of the writ; in which command is given to the sheriff to attach all and singular the goods and chattels, lands and tenements of the

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defendant, "in whose hands or possession soever the same may be." The 4th section then directs, that the writ shall contain a clause requiring the officer "to summon the garnishee, or person in whose hands any of the defendant's money or other effects may happen to be." This language is certainly very general, and looking at it in regard to its common import and meaning, would seem to authorize an attachment to be laid on the property and effects of a defendant in the hands of *any person* having the same, whether the parties, or either of them, were officer or not. And yet we find the courts deciding, in *Bulkley vs. Eckert, et al.*, that the fiscal officers of the State or county, or of municipal bodies, are not subject to the levying of attachments, and have never been supposed to come within the attachment law. Now, if in that case the treasurer of the board of school directors of a township having money in his custody to be applied to the support of the schools, is not, according to the proper construction of those laws, a person in whose hands any money or effects of the teacher are to be found, although for services rendered by the teacher there was money due him, and the necessity for guarding the public against the evils resulting from a different theory, induced the construction given in that case, there is just as much propriety, from necessity, in the present instance, for holding, that although the act of 1825 gives authority to levy an attachment in the hands of any person or persons, *corporate or sole*, nevertheless officers of a municipal corporation are not subject to the provisions of that act. The principle seems to be well settled, that without this act such officers would not be liable to process of this sort. That necessity which established this principle, and which likewise justified the Pennsylvania courts in so restricting the general language of their statutes as not to include even the treasurer of the board of school directors for a township, will not permit us so to construe our law as to sustain the plaintiff's claim. Reason and necessity we think fully justify the construction that the act does not include but excepts cases of this sort. In *Dwarris on Statutes*, 728, in 9 *Law Lib.*, 63, it is said: "In law all cases cannot be foreseen or expressed; the object of interpreting laws by what is called

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equity, is to supply, as far as possible, this deficiency, by a recurrence to natural principles of justice. It is the same with cases *excepted* by reason and necessity out of the prescribed rules. As relates to this branch of interpretation last considered, when cases fall out which should not be determined by the literal rule, and therefore excepted out of it, the expressions of *Grotius* are strictly applicable: "*Fit autem, ea correctio, non tollendo legis obligationem, sed declarando legem in certo casu, non obligare.*" And in the case of the *State, use of Mayor & City Council of Balto., et al., vs. Boyd*, 2 *G. & J.*, 374, the court say: "Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes, though within the letter; on the principle that what is within the intention of the makers of a statute, is within the statute, though not within the letter; and that what is within the letter of a statute, but not within the intention of the makers, is not within the statute; it being an acknowledged rule in the construction of statutes that the intention of the makers ought to be regarded."

In *Hawthorn vs. City of St. Louis*, 11 *Missouri Rep.*, 59, it was decided that under the provisions of the statute of that State, to be found in the *Revised Code of* 1835, *page* 254, a public municipal corporation could not be summoned as garnishee, on account of a sum due to an officer of the corporation as part of his salary, although it had been held that private corporations might be "proceeded against by garnishment." Hawthorn caused the city of St. Louis to be summoned as garnishee of Clark, who was recorder of the city, the plaintiff being an execution creditor of Clark, to whom the city owed a balance on account of his salary. Because the city was "a public municipal corporation, created for the public benefit," the court held it not to be subject to the rules governing private corporations, such as banks, insurance companies, and other similar corporations. They then say: "It should not, therefore, be compelled to stand at the bar of all the courts in the State and participate in the judicial controversies carried on between debtors and creditors. Whilst these contests would be going on the public interest would suffer, by abstracting

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from their corporate duties the time and attention of the officers, and occupying them in contests about which the corporation had no interest. And however desirable it may be to creditors to enforce against the officers of the corporation their just demands, by the means resorted to in this case, yet we think that public policy forbids the imposition of such a liability upon the corporation."

Neither in the Massachusetts or the Pennsylvania case are the officers held to be excluded from the operation of their attachment laws, because those laws are considered as having reference to *persons as individuals*, and not to corporations. And in the Missouri decision the liability of private corporations is distinctly recognized. In all those cases we find the exemption of officers from attachments placed upon considerations of public policy, having in view the necessity of preventing serious impediments to the prompt and efficient discharge of official duties; just such considerations as should exclude the present parties from the operation of the act of 1825, by construing its language as not including corporations of a public municipal character.

The counsel for appellee says, that under the city charter the defendant, Brashears, could have sued the corporation for his claim, if his salary had been improperly withheld: and being a claim for which he had a right of action, it was a credit subject to attachment. Admitting, however, that Brashears might have maintained an action against the corporation, still the right of the appellee to attach the claim is not relieved from the objection to it, based upon considerations of public policy. Because a claimant may sue, it does not follow that his creditor can attach the claim in every case, although as a general rule it may be so. There is no intimation in the Pennsylvania case that the school teacher could not have sued the treasurer of the board of school directors. And although in *Hawthorn vs. The City of St. Louis* the liability of the city to be summoned as garnishee was denied, yet there can be no doubt that Clark, the recorder, had a right to sue the corporation for the amount of his salary then due. That this is true may be seen by reference to the decision in *Carr vs. The*

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City of St. Louis, 9 *Missouri Rep.*, 191. There the plaintiff claimed fees due from the corporation to him, as *recorder* of the city, and his right to recover was sustained. See also article 1, section 2, of the amended charter of St. Louis, approved February 15th, 1841, and article 1, section 2, of "An act to reduce the law incorporating the city of St. Louis, and the several acts amendatory thereof, into one act, and to amend the same," approved February 8th, 1843.

Under the belief that the claim of Brashears was not liable to attachment, we must reverse the judgment below.

Judgment reversed and no procedendo ordered.

Bernard U. Campbell, Attorney and Trustee of Emily L. Harper, *vs.* Washington Booth.

Defences to a *scire facias*, that there was an outstanding *fi. fa.* in full force when the *sci. fa.* issued, or that the judgment was satisfied before issuing the writ, cannot be availed of upon *motion to quash*, but can only be taken advantage of by *plea*.

The mere taking of property under a *fi. fa.* is not of itself equivalent to payment, and does not amount to a satisfaction of the judgment.

Irregularities apparent upon the face of a *scire facias* may be taken advantage of by *motion to quash*, but objections involving questions of fact only, or dependant partly upon matters of record and partly upon matters *in pais* must be *pleaded*.

Payment of a less sum than is due on a judgment, though received in full thereof, cannot operate as a discharge or satisfaction of the judgment.

Where two or more parties are jointly bound the claimant may release one, and reserve his remedy against the others, *with their consent*.

An entry upon the docket of the *filing* of the receipt of the plaintiff's attorney for part of the sum due, *in full of the judgment* against *one* of the defendants, is not an entry of *satisfaction*, nor can it operate as a *release* of the judgment.

Such entry is not the act of the court but of the clerk, merely noticing the filing of the receipt as usual in regard to papers filed in a cause.

Where an entry of satisfaction made by the clerk, by order of the plaintiff or his attorney, under the act of 1840, ch. 96, is relied on as a defence, the law must be *strictly complied* with.

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Campbell, Trustee of Harper, *vs.* Booth.

APPEAL from the Superior Court for Baltimore city.

This is an appeal from a judgment quashing a writ of *scire facias* upon *motion*. The facts are briefly as follows:

On the 19th of September 1843, an action was docketed by consent in Baltimore county court, by the appellant as plaintiff, against the appellee and John B. and Richard B. Fitzgerald, partners, trading under the firm of John B. Fitzgerald & Co., as defendants, upon their joint and several promissory notes in favor of J. J. Speed, trustee of Emily L. Harper, and on the same day judgment was confessed in favor of the plaintiff for $1600.85, with interest from the 13th of October 1842, and costs, subject to a deduction of $402.53 when paid, (and which was subsequently paid,) it being the sum awarded in the auditor's report in the case of John B. Fitzgerald an insolvent debtor, and subject to the release of said insolvent under the insolvent laws. In the docketing of this suit Charles Z. Lucas acted as the attorney for the plaintiff, and *J. J. Speed* and J. Hanan as attornies for the *defendants*.

On the 21st of October 1843, a *fi. fa.* was issued on this judgment returnable on the 1st of January 1844, which was returned by the sheriff: "Laid as per schedule." The schedule shows that the property levied on consisted of several lots of ground in the city of Baltimore, valued at $4680.

On the 11th of June 1844, the following papers and receipts were filed in the case: 1st. A letter dated the 28th of May 1844; from Charles Z. Lucas to George M. Gill, in which the writer states: "I am authorised by B. U. Campbell, Esq., attorney of Emily L. Harper, to release the judgment obtained by consent, on September 19th, 1843, against R. B. Fitzgerald, upon his paying the *per centum* heretofore offered by him, (which I believe was 20 *per cent.*,) upon the amount of the judgment, ($1600.85,) with interest from October 13th, 1842; and upon your giving me in writing Mr. Speed's agreement, that no advantage will at any time be taken by him in any manner of this compromise with Capt. F. I hope these terms may meet your approval." 2nd. The following receipt, dated June 7th, 1844, signed by Charles Z. Lucas, attorney for Bernard U. Campbell: "Received of George M. Gill,

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attorney of R. B. Fitzgerald, $348.03, and $6.25 costs, the same being in full of judgment against said R. B. Fitzgerald at suit of Bernard U. Campbell, attorney of E. L. Harper, rendered at September term 1843, in Baltimore county court;" and 3rd. A receipt from the sheriff for $10, as "sheriff's costs in the above case." On the same day the following entry was made on the docket in said case: "11th June 1844, receipt of plaintiff's attorney for $348.03, and $6.25 costs, in full of judgment against R. B. Fitzgerald, and receipt of sheriff for $10, his costs, filed."

On the 6th of September 1851, the plaintiff sued out a *scire facias* upon this judgment against all the defendants, which was returned "*nihil*" as to the others, and "*made known to Washington B. Booth,*" who appeared and *moved* to quash the writ for the two reasons stated in the opinion of this court, which motion the court, (FRICK, J.,) sustained, and gave judgment for the defendant, from which the plaintiff appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

T. Parkin Scott for the appellant, argued:

1st. That the levying of the *fieri facias* was not in law a satisfaction of the judgment, and that the return of the writ and the subsequent arrangement between the parties show that that levy was abandoned. 5 *G. & J.*, 109, *Sasscer vs. Walker.* 2 *Gill*, 486, *Hardesty vs. Wilson.* If the writ had not been returned the burden of proof would have been on the appellant to show that the judgment had not been satisfied, but here the writ was returned and the levy abandoned. Again, one obligor cannot plead that the goods of his co-obligor were taken in execution. Such is the case here. Booth, one of the original defendants, is seeking to take advantage of the levy upon the lands of his co-defendant, which he cannot do. 2 *Saunder's Pl. & Ev.*, 47, *note (a,)* 72 *(aa.)* The *fi. fa.* we insist therefore was not *outstanding* when the *scire facias* issued, but had been returned before.

2nd. That this was not an attempt to have two outstanding

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executions upon the same judgment at one and the same time, but simply an effort to revive a judgment that it might be executed. 7 *G. & J.*, 357, *Mullikin vs. Duvall.*

3rd. That the partial payments made were not received or intended to be in extinguishment of the judgment, but only in relief of one of the parties with a salvo. There is no evidence that Speed ever made any agreement to give a release, and if he did, that it was ever *executed.* Besides, Speed acted as counsel for these defendants, and the agreement to be made by him that he would take no advantage of the compromise with one of the defendants, may be very well construed into a reservation of the plaintiff's remedy against the *other defendants.* The whole proceedings show that there was only a compromise of the judgment so far as Capt. Fitzgerald was concerned, and not of the *whole judgment.* The entry on the docket is not an entry of *satisfaction* of the judgment, but simply a receipt in full of the judgment as against Capt. Fitzgerald. Payment of part is not satisfaction of the whole. The defendants were equally liable as partners, and promised jointly and severally to pay the notes on which the original judgment was obtained. In support of these positions, see 2 *H. & J.*, 324, *Hughes vs. O'Donnell.* 5 *G. & J.*, 356, *Clagett vs. Salmon.* 5 *Gill*, 196, *Hardey vs. Coe. Ibid.*, 217, *Gurley vs. Hiteshue.* 7 *Md. Rep.*, 108, *Jones vs. Ricketts.*

4th. That the grounds of defence taken to the *scire facias* cannot be availed of *on motion*, but can only be taken advantage of by *plea.* 48 *Eng. C. L. Rep.*, 634, *Holmes vs. Newlands.*

George M. Gill for the appellee, argued:

1st. That before the issue of a *scire facias* the *fi. fa.* and levy under it ought to have been *countermanded* or disposed of, for whilst a *fi. fa.* is levied and outstanding, the plaintiff cannot legally issue a *scire facias.* The taking of property under a *fi. fa.* is not of itself equivalent to payment, and the plaintiff might have countermanded the writ and restored the property, but until he did so he could take out no other process. 5 *G. & J.*, 109, *Sasscer vs. Walker.* 3 *Do.*, 384, *Turner vs. Walker.* 1 *H. & McH.*, 407, *Waters vs. Caton.* 3 *Gill*,

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246, *Baldwin, use of Owings, vs. Wright, et al.* 23 *Wend.*, 501, *Green vs. Burke.* 4 *McLean*, 133, *Corning vs. Burdick. Coxe. N. J. Rep.*, 118, *Stille vs. Wood.* 3 *English*, 388, *Anderson vs. Fowler.* In 2 *Harr. Ent.*, 526, is the form of a plea to a *scire facias*, that the sheriff had *caused to be levied* a *fi. fa.* upon the property of the defendant. See also 5 *H. & J.*, 77, *Purl vs. Duvall; Evan's Pr.*, 372, and *Act of* 1829, *ch.* 158. But it is said the defendant should have *plead* this defence, and that a *motion to quash* the writ is not the proper remedy. To this objection we reply that a *scire facias* is not a *new case*, but a continuation of the original judgment. It is not a *new suit*, but its object and effect is to revive the *old* judgment. The case is analogous to that of attachments, which are quashed on motion in all cases where it is apparent on the face of the record that the proceedings are erroneous. Wherever upon the *face of the record* the error is *apparent* a motion to quash is the proper remedy. *Evan's Pr.*, 238. It is true we *might* have *pleaded* this defence, but this does not preclude us from making the *motion* to *quash*.

2nd. The judgment in this case being against partners, satisfaction by one is a satisfaction by all, and a release to one is a release to all. *Smith on Mercantile Law*, 67. 4 *Adol. & Ellis*, 675, *Nicholson vs. Revill.* 6 *Term Rep.*, 525, *Clark vs. Clement.*

3rd. The payment of a less sum than the whole debt will not, *per se*, work a satisfaction, though such lesser sum be paid and received as satisfaction, but where there is something collateral to show the possibility of benefit to the party relinquishing, this will be sufficient. Thus if a lesser sum be paid before it is due, or at another place than that limited in the condition, it is a good satisfaction. 5 *East*, 232, *Fitch vs. Sutton.* So if a note of a third person is received. 11 *East*, 390, *Steinman vs. Magnus.* So if there be inconvenience to the defendant in procuring a surety. 20 *Johns.*, 78, *Boyd vs. Hitchcock.* 6 *Cranch*, 253, *Shieehy vs. Mandeville.* So if the debtor, in addition to the agreement to pay part of the debt, gives to the creditor any thing which in judgment of law

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can be considered a benefit to him, and the creditor accepts it as a satisfaction of the whole, it is a good accord. *Forsyth on Comp.*, 17. Here the proposition by the plaintiff to the defendant and partner, R. B. Fitzgerald, was to pay a certain per centage and to obtain the agreement in writing of Mr. Speed, (the first trustee of the plaintiff,) that he would take no advantage of the compromise. This proposition and the receipt showing its acceptance and performance of the conditions are both on the same paper, bear very nearly the same date, were filed in the cause on the *same day*, and on that day also the entry on the docket is made of satisfaction of the judgment in full. This was a release to R. B. Fitzgerald, and if to him, then also to the other defendants.

4th. The entry on the docket of the 11th of June 1844, shows that the receipt of the plaintiff's attorney, as in full of the judgment against R. B. Fitzgerald, had been filed in court. This entry showing satisfaction, remained unchanged until the 6th of September 1851, and then without any change, or motion for a change; the application for a *scire facias* against all the defendants, including R. B. Fitzgerald, is made to the clerk who issues the writ. This was an error, and the *scire facias* could not properly go until the docket entry showing satisfaction had been first altered, even if it could be altered at so late a day.

4th. The defendant, R. B. Fitzgerald, not only paid the amount agreed to be received in satisfaction and obtained the agreement in writing of Speed, but in addition thereto paid the sheriff's costs of $10, which was beyond the agreement, and he as defendant was not bound to pay in the then state of the case. Taking both receipts, the docket entries and the lapse of time, before any attempt is made to change these entries or treat them as nullities, there was conclusive evidence of satisfaction by R. B. Fitzgerald and of a release to him. The release to one releasing all, the original judgment was discharged and no *scire facias* could be issued.

Eccleston, J., delivered the opinion of this court.

In the court below the defendant made a motion to quash the writ:

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First, because it appears that a *fieri facias* had been issued which was levied upon certain real estate, and had not been countermanded nor in any way disposed of, but continued in full force and operation when the writ of *scire facias* issued.

Secondly, because the judgment on which the present writ issued was satisfied before the issuing of the writ.

The court sustained the motion by ordering the *sci. fa.* to be quashed; from which decision the plaintiff appealed. And he now says, the execution was not outstanding when the *sci. fa.* issued nor was the judgment satisfied. He also contends, that the grounds of defence relied upon could not be available under such a motion, but could only be taken advantage of by plea.

A question of this sort arose in the case of *Holmes vs. Newlands*, 5 *Adol. & Ellis, N. S.*, 367, in 48 *Eng. Com. Law Rep.*, 366. There a *fi. fa.* issued, which was returned *nulla bona*. Afterwards an alias *fi. fa.* was obtained and also a *ca. sa.* The latter of these two writs was set aside for want of a return of the former. Subsequently, a *scire facias* being sued out, the defendant obtained a rule calling on the plaintiff to show cause why this writ should not be set aside on account of the previous proceedings. The court discharged the rule because the *sci. fa.* could not be set aside in that summary manner, but such facts when relied on in defence should be pleaded. The case clearly shows, that where an outstanding execution, whether returned or not, is the ground of defence, the party must plead it to make it available. And this is the rule in England, where it seems to be held, that a levy without a sale and no money is paid, under some circumstances, is a satisfaction of the judgment. If there a plea must be resorted to, we think the present motion cannot be sustained upon either ground relied on by the defendant.

The case of *Holmes vs. Newlands* is also reported in 1 *Davison & Meriv.*, 642, and a branch of it is to be found in 5 *Adolp. & Ellis, N. S.*, 634.

In *Sasscer vs. Walker's Ex'rs*, 5 *G. & J.*, 109, Chief Justice Buchanan says: "The mere taking the property under the *fieri facias* was not itself equivalent to payment, and did

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not amount to a satisfaction of the judgment." This principle is not intended to be impugned in any degree by our reference to *Holmes vs. Newlands* for the purpose of sustaining the position, that the court below were wrong in deciding the present motion to quash in favor of the defendant. It is deemed proper to make this remark, because the opinion of Lord Denman in that case, so far as relates to the effect of a levy or seizure under a *fi. fa.*, may seem to be at variance with the principle announced in 5 *G. & J.*

Philpot vs. Manuel, 5 *Dow. & Ry.*, 615, is an authority in support of the principle adopted in *Holmes vs. Newlands*, by discharging the rule because a plea was necessary.

Irregularities apparent upon the face of a *sci. fa.* may be taken advantage of by motion, and should it be conceded there are irregularities depending exclusively upon matters of record, but not appearing on the face of the writ, which may be made the ground of a motion to quash, yet whenever objections to the writ involve questions of fact only, or depend partly upon matters of record and partly upon matters *in pais*, then such objections should be presented by plea; otherwise, a plaintiff might be deprived of his right of trial by jury upon issues in fact, which the court is never disposed to do except where it has been sanctioned by practice or by previous decisions. Believing that both objections now relied upon may, when fully disclosed by pleading, present issues in fact proper for the consideration of a jury, we think the motion to quash was not the proper mode of defence.

For the purpose of showing satisfaction of the judgment in support of the second ground of objection to the *sci. fa.*, reliance is placed upon the compromise made with R. B. Fitzgerald, which it is said discharged him, and thereby his co-defendants were also discharged. The evidence relating to which consists of the letter, dated the 28th of May 1844, from plaintiff's attorney to the attorney of R. B. Fitzgerald; the receipt from the former to the latter, dated the 7th of June 1844, for $348.03, and $6.25 costs; the filing of those two papers in court, on the 11th of the same month, together with the sheriff's receipt for $10 costs, and the entry made the

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same day on the docket in the following words: "Receipt of plaintiff's attorney for $348.03, and $6.25 costs, in full of judgment against R. B. Fitzgerald, and receipt of sheriff for $10, his costs, filed."

Although the receipt states the amount paid to be in full of the judgment against R. B. Fitzgerald, yet as that amount is less than the sum due, the payment and receipt, unaided by any thing further, could not operate as a discharge or satisfaction of the judgment, even if R. B. Fitzgerald had been the sole defendant. This principle we need not stop to sustain by argument, because it has been fully recognised by numerous decisions in this State, and especially in the late case of *Jones vs. Ricketts*, 7 *Md. Rep.*, 116, and the cases there referred to. But the appellee's counsel says, that in addition to the payment of the money, R. B. Fitzgerald, or his attorney for him, was required by the terms of the arrangement, as proposed in the letter, to give the plaintiff's attorney, in writing, Mr. Speed's agreement, that no advantage would at any time be taken by him in any manner of the compromise; that the required agreement was given, is fully established by the speedy payment of the money and the receipt; and that a compliance with this part of the arrangement, superadded to the payment under the contract, released R. B. Fitzgerald, which operated as a release of all the defendants in the judgment. And if wrong in this view of the subject, the appellee insists that the circumstances just alluded to, when considered in connection with the filing of the papers and the entry made upon the docket, which entry was permitted to remain without any effort to have it corrected up to the date of the *sci. fa.*, are sufficient to sustain the second ground of objection to the writ.

It is of no importance whether the appellee is right or not, in assuming that the circumstances relied upon do prove the giving of Mr. Speed's written agreement. If the evidence does not show it was given, of course the agreement can have no influence upon the subject. But let us see what is the effect of that instrument, considering it as having been executed and delivered. The record shows that Mr. Speed was attorney for the defendants when the judgment was confessed.

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That being the case, and not having the agreement before us or any proof showing what were its terms or its design, except what is to be derived from the letter; in this very unsatisfactory state of the evidence, we are disposed to consider Mr. Speed's agreement as one entered into by him, as attorney for the defendants, that no advantage would "at any time be taken by him in any manner of this compromise" with one of the defendants; and that the object and design of the plaintiff in obtaining the agreement was, for the purpose of reserving and protecting his right to recover from the other defendants the balance of the judgment remaining unpaid, after deducting the amount to be paid under the compromise. Whether this view of the agreement may or may not be shown to be erroneous by further evidence on the subject, it is impossible for us at present to form any correct conjecture. If Mr. Speed executed the agreement as attorney for the defendants, and the design of the instrument was such as we have stated, then, so far from its operating to any extent as a release or discharge of the defendants, other than R. B. Fitzgerald, it was a reservation of the right of the plaintiff to hold them responsible, notwithstanding the compromise. To which reservation these defendants are to be considered as assenting, through their attorney, Mr. Speed. And it cannot be doubted, that where two or more persons are bound, jointly, the claimant may release one and reserve his remedy against the others, with their consent. The subject of releasing one party and reserving the remedy against others who are responsible under the same contract, is very fully treated of in *Yates vs. Donaldson*, 5 *Md. Rep.*, 389. We also refer to that portion of the opinion of the court of *Queen's Bench*, in *Price vs. Barker*, 30 *Eng. Law & Eq. Rep.*, 157, which relates to the effect of releasing one of several parties, bound as *principals*, and reserving the right to proceed against the others.

Should it be suggested, that as attorney, Mr. Speed had no authority to enter into such an arrangement, we need not enquire whether the suggestion is true; for if it is, then the plaintiff's attorney could not bind him by the compromise, and consequently it could not release the defendants.

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The entry on the docket, in addition to the other circumstances, the appellee's counsel seems to consider as a complete discharge or satisfaction of the judgment, even if exclusive of the entry, the proof in the case does not amount to satisfaction. But we do not see how it can be so. We have said the payment and receipt, standing alone, do not amount to a release, and they cannot do so if Mr. Speed's written agreement was executed and delivered to the plaintiff's counsel in the manner and with the design we have stated. The entry is nothing more than a mere statement of the fact, that the receipt of the plaintiff's attorney had been filed, which professes on its face to be in full of the judgment as against R. B. Fitzgerald. If, before filing and making the entry, the receipt was not in law a release or satisfaction, how could the mere filing, and the entry on the docket of such filing, impart to the paper any greater effect or influence upon the rights of the plaintiff than it possessed by virtue of its execution and delivery by the plaintiff's attorney to the defendant, or his attorney? This is not an entry of satisfaction in the ordinary mode, under the sanction or order of the court. Nor can it be regarded as satisfaction of the judgment entered by a clerk, by order of the plaintiff or his attorney, under the act of 1840, ch. 96, which act should be strictly complied with when it is to be made a ground of defence. For without such a compliance, if not with it, the rights of plaintiffs in judgments will be exposed to considerable danger. The present paper is not an *order* to enter satisfaction, neither is it a release under seal, but merely a receipt for a less sum than was due, stating the *same* to be in full of the judgment against *one defendant*. We do not regard the entry as an act of the court but of the clerk, merely noticing the filing of the receipt, as usual in regard to papers filed.

The entry itself shows the receipt to be for a sum less than the judgment and as being in full only in regard to R. B. Fitzgerald, and therefore certainly not designed by the plaintiff or his attorney as an order to the clerk to enter the entire judgment satisfied. The filing of such a receipt and the entry of the filing upon the docket by the clerk, cannot convert it into a release. If it was not one before, it was not one subsequently.

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As the judgment will be reversed because the writ could not be quashed upon the present motion, we refrain from expressing any opinion in regard to several points discussed in argument, for the reason, that when the case is fully disclosed by pleadings and evidence, it may present a very different aspect from what it now does.

Judgment reversed and procedendo ordered.

Francis H. Edelin *vs.* Edward J. Sanders, Exc'r of William Sanders.

The general plea of *non est factum* imposes on the plaintiff the *onus* of proving both the execution and *delivery* of the bond.

Proof of execution and possession is *prima facie* evidence of delivery, and in the absence of all proof on the other side will entitle the obligee to a verdict.

The *seal* imports a consideration and the latter *as such* cannot be inquired into under the plea of *non est factum*, but the obligee may give in evidence anything which goes to show the bond was originally void at common law, as lunacy, fraud, coverture; or that it has become void subsequent to execution and before suit, as by *erasure*, *alteration*, &c.

When there is nothing *in the record to show it* this court cannot *assume* that a bond was erased or altered after delivery, and can have no *judicial knowledge* of the fact if it existed.

If upon inspection the bond appeared to have been altered the fact should be noticed in the exception either by agreement or by asking the opinion of an *expert* in handwriting his opinion as to its appearance.

Where there is proof that a bond has been *altered* facts tending to show *fraud* on the part of the obligee, by showing his relations and dealings with the obligor, are admissible under the plea of *non est factum*.

The *will* of a testator is not admissible in evidence for the executor in an action against such executor, because to allow it to be given in evidence would be to permit a party to testify in his own case and in his own behalf.

Where there is no evidence on which the hypothesis of a prayer could be based it must be rejected.

The name of the obligee is a *material* part of a bond, and as a general principle delivery in *blank* is an insufficient delivery, unless recognized after the blank is filled up.

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Edelin vs. Sanders, Exc'r of Sanders.

Where a prayer on the part of the plaintiff requires the jury to find all that is essential to the plaintiff's right to recover the addition of mere *surplusage* will not vitiate it.

APPEAL from the Superior Court of Baltimore city.

Debt, brought by the appellant, on the 30th of October 1849, upon an alleged bond of the appellee's testator in favor of the plaintiff for $2000, dated the 11th of December 1838 and payable on or before the 1st of July 1840, without interest until that time. The defendant, as executor, under leave of the court, pleaded *non est factum* without oath, upon which issue was joined.

1*st Exception.* The plaintiff gave in evidence the bond sued on, (which appears in the record as perfect on its face, without any appearance of *erasure,)* and his possession thereof at the bringing of this suit; and then proved by William B. Stone and other witnesses the facts stated in the opinion of this court, and also that there was a controversy between defendant's testator and the plaintiff about the negroes referred to, as the plaintiff claimed them to be in the same secret trust, which trust the testator always denied; that a proposition was made by some of the parties, that a bond should be executed by the testator and left in the hands of a third party, as an *escrow*, as security that the testator would not sell the negroes or dispose of them; but this proposition failed, and witness does not know whether any paper was prepared to carry out such proposition. Also, that said testator was the brother of said Rebecca Boarman and uncle to the plaintiff's wife, and that both the bond to the plaintiff and that to Rebecca Boarman correspond with the time, as regards their payment, when the purchaser of said real estate was to begin to pay interest to the testator. Also, that the testator suffered the plaintiff and Mrs. Rebecca Boarman to remain in possession and use of the negroes mentioned up to the time he replevied them from the plaintiff. The defendant then offered in evidence a record of a *replevin suit*, in Charles county court, by the defendant's testator against the plaintiff, for certain negroes therein specified, begun on the 13th of January 1844, and setting out the recovery of said negroes by the plaintiff in that suit; and also,

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a record of an action of *debt* in Charles county court by the defendant in this case, as executor of William Sanders, against the plaintiff, begun on the 30th of May 1850, upon a sealed note of the plaintiff in favor of said William Sanders for $500, dated the 3rd of April 1840, and payable on demand, upon which judgment was rendered in favor of the plaintiff in that case for the full amount of the note. To the admissibility of each of these records as evidence in this case, the plaintiff excepted, but the court, (FRICK, J.,) overruled this objection and permitted the records to go to the jury as evidence. To this ruling the plaintiff excepted.

2nd Exception. In addition to the testimony in the first exception the defendant proved, that a short time after the death of Sanders witness had a conversation with the plaintiff, in which he spoke of his note to Sanders for $500, saying he did not intend to pay it as it was not Sander's money, but was a portion of the money for the sale of land which his (plaintiff's) wife was entitled to, but he said nothing to witness about the bond in suit. The plaintiff then offered proof of his general character for integrity. The defendant then offered to read the will of William Sanders, his testator, in which he devises to the plaintiff's wife and Rebecca Boarman the negroes recovered by him in the replevin suit mentioned in the first exception. To the admissibility of this will the plaintiff objected, which objection the court overruled, and admitted the will in evidence. To this ruling the plaintiff excepted.

3rd Exception. The plaintiff then offered the following prayers:

1st. It is not competent for the defendant in this case to impeach or question the consideration of the note sued on, and the only matter for the jury to consider under the pleadings is, whether the defendant's testator executed and delivered the note as claimed by the plaintiff, and if the jury find such execution and delivery the plaintiff is entitled to recover, unless the jury further find, that said note has been altered by the plaintiff or by his procurement in some material particular after such execution and delivery.

2nd. If the jury shall believe from the evidence, that the

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single bill in suit was made by William Sanders, the defendant's testator, payable in blank, and was so delivered to the plaintiff, then the plaintiff is entitled to recover in this action.

3rd. If the jury believe from the evidence, that the single bill in suit was executed by the defendant's testator, payable to some other obligee than the plaintiff, and the name of such obligee was subsequently erased and the name of the plaintiff was substituted as payee with the knowledge of the defendant's testator, the plaintiff is entitled to recover in this case.

4th. If the jury believe that the note in suit was delivered to the plaintiff by the defendant's testator, and that the name of the payee was left blank at the time of such delivery, but the same was intended by said testator to be filled up with the name of the plaintiff and for his benefit, then no alteration or erasure in the name of the payee would vitiate it, even if the same was made by the plaintiff, provided the jury believe that as altered it contains the name of the plaintiff as payee.

5th. That the possession of the single bill in suit by the plaintiff is *prima facie* evidence of the sealing and delivery of the same by the obligor to the plaintiff, provided the jury find that the said single bill is subscribed with the signature of the defendant's testator in his own proper handwriting.

6th. If the jury find from the evidence, the execution and delivery of the single bill in suit by the defendant's testator as and for the obligation of the testator, then the plaintiff is entitled to recover, notwithstanding the other facts offered in evidence by the defendant.

The defendant then asked the following prayer:

If the jury shall find from the evidence, that the single bill, upon which suit is brought, was drawn by William B. Stone, the witness, payable to some other person than the plaintiff, and was executed and delivered, (if the jury shall find the same was ever delivered,) in that form by William Sanders, the obligor; or that the same, when so executed and delivered, was in blank, and shall find in the one case the same was afterwards altered by the insertion of a new payee, or in the other filled up with the name of the plaintiff, that then the plaintiff is not entitled to recover, unless the jury shall further

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find from the evidence, the subsequent adoption or recognition of said single bill by Sanders, the obligor.

The court rejected the defendant's prayer, and also the *first*, *second* and *sixth* prayers of the plaintiff, and granted the plaintiff's *third* and *fourth* prayers. The plaintiff's *fifth* prayer the court refused as it was offered, but granted and accepted it with this further explanation, that if the jury shall find that the said note was in blank as regards the payee when it came to the possession of the plaintiff, and that it was afterwards filled up, or altered, or erased in regard to the name of the payee after being filled up, without its being so intended by the obligor at the time, or afterwards adopted or assented to by him, that then the said *prima facie* evidence is rebutted and the defendant is not bound by such delivery.

Both parties excepted to each of these several rulings which was against him, and the verdict and judgment being in favor of the defendant the plaintiff appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

Vivian Brent and *R. T. Merrick* for the appellant, argued:

1st. That records from Charles county court, in the first exception, were not admissible in evidence. There was no attempt to prove a connection between the bond in suit and the particular slaves for which the replevin suit was instituted; and if the bond was given for the slaves which were subsequently recovered as against the bond and the contract out of which it grew, yet to admit the judgment of another court upon the validity of that contract and bond, virtually declaring both fraudulent and invalid, to go to the jury, is to allow the adjudication of that other court to determine the particular matter litigated in the court before which the parties are and to whose judgment they are entitled, independent of the judgment of any other tribunal. If the bond was given for the slaves in dispute in the replevin suit, and these slaves were returned by the party's own will or under the judgment of the court, and by virtue of such return paid and liquidated the bond or any

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part of it, that return cannot be given in evidence in this case. 9 *G. & J.*, 361, *Key vs. Knott & Wife.* The consideration of a bond cannot be inquired into except on the ground of *fraud*, and then only when the fraud alleged is in the consideration. 1 *Chitty's Pl.*, 483, 484, *(a.)* Again, there is no proof to show that the negroes recovered in the replevin suit were the same as those conveyed by the bill of sale spoken of by the witnesses. We therefore say, that the record in that suit was *irrelevant* to this case and inadmissible. The second record is of a suit for a *debt* in Charles county court, instituted *since* the present suit in Baltimore county court, and no connection is pretended between the two. The fact that the defendant recovered a judgment against the plaintiff in another court, cannot be admitted to show that the plaintiff has no claim on the defendant. It can establish nothing further than that such a judgment was rendered and is entirely irrelevant to the issues joined in this action. If one debt could be *set off* against the other, it was the defendant's duty to plead the *set-off*, because the present suit was instituted *prior* to the suit in Charles county.

2nd. That the will of the testator, admitted in evidence in the second exception, is not competent evidence for his executor in an action against that executor. The will is but the *declarations* of the *party himself* as to his title and possession of the negroes, which are clearly *inadmissible*. There is no conceivable ground upon which it could be admitted, unless it should have been supposed that *will* was necessarily a *dying declaration*. If the testator were living, he would be the defendant in this action and certainly would not be a competent witness in his own case, and yet justice would be more surely answered by allowing him, in that event, to testify in his own behalf, for the plaintiff would then have the benefit of a *cross-examination* and the security given by the *sanction of an oath*, both of which he is now denied but to which he is entitled, and both of which are tests of truth designed to *exclude all evidence not warranted by them.* 1 *Starkie on Ev.*, 14. This evidence was admitted to go to the jury under the judicial sanction of the court below, and this court cannot say it did the plaintiff

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no harm, for they cannot determine what weight or influence it had with the jury.

3rd. As to the prayers contained in the third exception: We say:—1st. That in an action on a single bill of which the plaintiff is in possession, proof of the defendant's signature is *prima facie* evidence of its *due execution and delivery*, though the validity of the instrument is disputed by a general *non est factum*. The seal imports consideration, and possession is *prima facie* evidence of *delivery*. 9 *G. & J.*, 361, *Key vs. Knott & Wife*. 1 *H. & J.*, 323, *Clarke vs. Ray*. 4 *H. & J.*, 241, *Miller vs. Honey*. 8 *G. & J.*, 511, *Pannell vs. Williams*. 6 *Pet.*, 137, *Sicard, et al., vs. Davis*. 1 *H. & G.*, 419, *Union Bank vs. Ridgely*. But it is said there is an *erasure* or an *alteration* of this bond, which throws the *onus* of proof upon the plaintiff to show that it was properly made; that the bond has *suspicious marks about it*. But where is this *erasure*, this *alteration*, these *suspicious marks*? There is no such proof in *the record*, nothing to bring them to the notice of this court, if they exist. The *materiality* of an *alteration* is a question for the court, and conceding there was an alteration, there is no proof that it was in a *material matter*. But even if there is an alteration, the *burthen* is not on us to show that it was *properly made*, but upon the party seeking to avoid the *sealed* instrument to show that it was improperly made. An interlineation in a deed, without any thing against it, will be presumed to have been done *before delivery*. 1 *Kebble*, 22, *Trowel vs. Castle*. *Fitzgibbons*, 214, *Fitzgerald vs. Fauconberge*. 2 *Starkie on Ev., note* 377. 16 *Sergt. & Rawle*, 44, *Heffelfinger vs. Shutz*. 5 *H. & J.*, 41, *Wickes vs. Caulk*. The basis of this presumption is, that the law always presumes in favor of *innocence*, for an alteration of a bond is a *criminal offence*, rendering the party liable to indictment. And if it appears that certain blanks in the bond have been filled up in a handwriting other than that in which the bond is written and other than that of the obligor, such blanks will be presumed to have been filled up before delivery or with the consent of the obligor since delivery, in the absence of proof to show the fraudulent intent of the plaintiff. 6 *G. &*

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J., 255, *Byers vs. McClanahan.* 1 *Maine Rep.*, 338, *Hale vs. Russ.* 13 *Do.*, 386, *Gooch vs. Bryant.* 12 *Viner's Abr.*, 58. 9 *Cranch*, 36, *Speake vs. United States.* 3 *Gill*, 337, *Fiery vs. Miller.* But under any theory of this case, the plaintiff was entitled to his *sixth prayer.* There were no facts offered by the defendant to rebut the *prima facie* case of the plaintiff; and whatever facts may have been offered, they could not justify the rejection of this prayer, which simply asks, that the plaintiff may recover if the jury shall believe that the single bill in dispute *was delivered by the obligor to the obligee as and for the obligation of such obligor.* This necessarily implies a delivery in its present shape and as it is offered in evidence, and the plaintiff had a right to have this question submitted in a clear and unembarrassed shape to the jury.

T. Parkin Scott and *Wm. Schley* for the appellee, argued:

1st. That issue having been joined upon the plea of *non est factum*, and *delivery* being essential to constitute the writing sued on the bond of the defendant's testator, if the plaintiff relies on the presumption of delivery from the fact of possession, then to rebut that presumption the defendant may offer in evidence any facts or circumstances from which a rational well constructed mind can infer that the writing was not delivered by the testator as his bond. 7 *G. & J.*, 29, 42, *Cole vs. Hebb.* 1 *Md. Rep.*, 11, 15, *Milburn vs. The State. Ibid.*, 474, *Waters vs. Dashiell.*

2nd. That though want of consideration is no defence to an action of debt on a bond under any form of pleading which admits the writing sued on to be the defendant's bond, yet under the plea of *non est factum* the want of consideration is a circumstance admissible in evidence to rebut the presumption of delivery from *mere* possession, and more especially where the plaintiff attempted and failed to prove any consideration, either valid or valuable, to induce the belief that defendant in fact executed and delivered the writing as his bond to the plaintiff. 1 *H. & G.*, 416, 418, 419, *Union Bank vs. Ridgely.* 5 *G. & J.*, 303, 304, *Davis vs. Calvert.* 9 *Cranch*, 37, *Speake*,

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et al., vs. The United States. Under this plea the question is not upon the *dry execution*, but upon the *valid execution* of the deed.

3rd. That in the absence of positive proof of delivery of the writing as his bond, any facts tending to show that there was no probable cause or good reason for its delivery are admissible, under the plea of *non est factum*, to rebut the presumption of delivery from mere possession. This suit was not brought until the bond was more than *nine years* due, and not until *after* the death of the alleged *obligor*. Whether the record in the replevin suit was admissible depends not only on the issue, but upon the preliminary proof of *Stone* and the other witnesses. Stone speaks of a bill of sale and of the proposition to give a note to be deposited as an *escrow*, as security that the testator would not *sell the negroes*. Now it was important for the defendant to *disprove* the *secret trust* as to the negroes, to rebut the inference attempted to be set up of *such trust* as a consideration for the bond. To do this the record in the replevin suit shows that Sanders asserted his *title* to the negroes and maintained it. Again, the *plaintiff himself* went into proof of the consideration of the bond. Any fact therefore *rebutting* this proof on the part of the plaintiff was admissible. If any attempt was made to use the record for an improper purpose, the court would have restrained it upon a prayer framed for that object. As to the *other record*, it shows that Edelin was *indebted* to *Sanders* and that he might have *set off* this bond against that action. This *non action* on the part of the plaintiff in not thus setting off this bond in bar of that suit in his own county where the suit was instituted, is a *circumstance* which is entitled to *weight*. We say therefore that these records tend to show a want of probable cause, or any good consideration or reason for the delivery of the writing sued on as the bond of the testator; that they are circumstances from which the presumption of *fraud* may arise, and were admissible also as *rebutting* evidence. 13 *Pick.*, 75, *Powers vs. Russell.* 6 *Md. Rep.*, 295, *Townshend vs. Townshend.* 7 *Do.*, 601, 608, *Pegg vs. Warford.*

4th. The question presented by the second exception as to

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the admissibility of the will of the testator is one of some difficulty. The question however is, whether the *will* was *admissible for any purpose*. It shows that the testator disposed of the negroes in a manner *inconsistent* with the idea of a *secret trust*, and that no one contested this *disposition*. Again, it was admissible to explain the theory of the *escrow*. But we say this exception is disposed of by the point that the will, if inadmissible, *did no harm to the plaintiff*, and the judgment therefore will not be reversed for the error of admitting it. The plaintiff had the full benefit of all the evidence in the case from his *third* and *fourth* prayers which were *granted* by the court. The admission of irrelevant testimony will not authorise a reversal, unless it appears it did or might have done the appellant harm. 1 *Gill*, 60, *Mulliken vs. Boyce*. 9 *Gill*, 1, *Dakin vs. Pomeroy*. *Ibid.*, 56, *Ramsay vs. Glass*. *Ibid.*, 120, *Anderson vs. Garrett*. *Ibid.*, 156, *Clements vs. Smith*. 12 *G. & J.*, 484, *Doyle vs. The Commissioners of Balto. County*. 5 *Do.*, 159, *Md. & Phenix Ins. Co. vs. Bathurst*.

5th. As to the several prayers embraced in the third exception: The *first* prayer of the plaintiff is *defective* for various reasons. You may question the consideration of the bond. If there was a *total failure* of consideration *mingled with fraud*, it may be given in evidence under the plea of *non est factum*. Any fact which shows that the deed is *not the deed of the party* is admissible as a circumstance to go to the jury. Again, the prayer says the only question for the jury is to consider whether the testator executed and delivered the note "*as claimed by the plaintiff*." What does this mean? Does it mean as alleged in *pleading* or as *proven in evidence*? In this particular the prayer is uncertain and calculated to mislead the jury. Again, the bond was *altered* and *erased*, and it bore evidence of this on *its face*. The prayers of the plaintiff himself all *concede* this fact, and this court therefore must treat it as appearing on the record. This *erasure* and *alteration* was a *suspicious circumstance*, which throws the *burthen of accounting for it* on the *plaintiff*. *Buller's N. P.*, 267. 2 *Croke*, 626, *Markham vs. Gonaston*. 14 *East*, 568, *Weeks vs. Maillardet*. 11 *Coke's*

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Rep., 27, *Pigot's case*. The prayer requires the alteration to be made by the *plaintiff*, whereas the cases just cited show that if it be made by a *stranger* and is *material*, it equally avoids the deed. In this particular also the prayer is defective. Where there is an alteration apparent on the face of the note, the *onus* is thrown on the plaintiff to show that it was made with *consent of the parties*, and that it was not *improperly made*. 25 *Eng. C. L. Rep.*, 395, *Taylor vs. Mosely*. 5 *Bing.*, 183, *Henman vs. Dickinson*. 1 *How.*, 111, *United States vs. Linn, et al.* 1 *Metcalf*, 224, *Davis vs. Jenney*. 9 *Cranch*, 28, *Speake, et al., vs. The United States*. 1 *Pet.*, 561, *Steele vs. Spencer*. 2 *Brock.*, 64, *United States vs. Nelson & Myers*. 6 *G. & J.*, 254, *Byers vs. McClanahan*. The *second prayer* excludes all other questions from the jury except the *delivery in blank*, and asserts that such delivery is *good*, but this proposition is contrary to the whole current of decisions. This and all the other prayers on the part of the plaintiff, rejected by the court below, utterly *ignore* the fact of alteration and erasure apparent on the face of the bond, and for this reason were properly rejected.

Le Grand, C. J., delivered the opinion of this court.

This was an action of *debt*, brought by the appellant, in Baltimore county court, against the appellee, as executor, upon an alleged bond of his testator for $2000, dated the 11th of December 1838, and payable on or before the 1st of July 1840. The suit was not brought until more than nine years after the bond became due and payable. On leave of court the defendant pleaded *non est factum* without oath.

In this state of the pleadings the plaintiff proved by a witness that the cause of action, with the exception of the date, name of the payee and the signature of the maker, was in his handwriting; that the signature was in the proper handwriting of the testator of the defendant, but he was unacquainted with that in which the name of the payee was written. He had no recollection whatever of having prepared the paper, and only knew the fact at the time of the trial from his recognition of his handwriting. The plaintiff further proved by the same

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witness, that about the date of the single bill sued upon, it was agreed between the plaintiff and defendant's testator, and Mrs. Rebecca Boarman, that the purchase money of certain real estate, sold by said testator for $2000, should be divided between plaintiff and Mrs. Boarman, so as to give her one-third part thereof; that the reason of said agreement was, that the land had been deeded many years before by Benedict L. Boarman to said testator, and the plaintiff claimed that it was so deeded in secret trust for the benefit of the grantor's wife, and of his only child, the wife of the plaintiff, but said testator denied said trust and declared that he so agreed as an act of generosity, so far as plaintiff's wife was concerned. The note payable to Mrs. Boarman for $666.66⅔, bearing date the same day, and in the same form as that sued upon, was also offered in evidence. It was also given in evidence that Benedict L. Boarman was largely indebted at the time of the execution of the deed to the testator; that there was also a bill of sale executed by the said Benedict, (about the same time as his deed for his lands,) to said testator, for certain of Boarman's negroes. Defendant's testator denied all secret trusts both in regard to the land and negroes. The defendant then offered in evidence the records of two suits in Charles county court, brought by the defendant's testator against the plaintiff. To the admissibility of these records the plaintiff objected, and the reception of them constitutes his first bill of exceptions.

The second exception of the plaintiff was to the admission on the part of the defendant of his testator's will, whereby it appeared that he claimed the right to dispose, as of his own, the property alleged by the plaintiff to have been conveyed to him in secret trust.

The third exception applies to the prayers granted and refused both on the part of the plaintiff and defendant.

Before noticing each of the exceptions, we deem it proper to state some of the principles of law, which, in our judgment, must control the decision of this case.

The plea on which issue was joined was that of a general *non est factum*. Whatever the law may be elsewhere, in Maryland it imposes on the plaintiff the *onus* of proving both

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the execution and delivery of the bond. Proof of execution and possession is sufficient evidence, *prima facie*, of delivery, and in the absence of all proof on the part of the obligor, would entitle the obligee to a verdict. The seal importing a consideration, the latter, *as such*, cannot be inquired into under this plea; but notwithstanding this, the obligee may give in evidence "any thing which goes to show that the instrument of writing was originally void at common law, as lunacy, fraud, coverture, &c., or that it has become void subsequent to the execution and before the bringing of the suit, as by *erasure*, alteration," &c. *Union Bank of Md. vs. Ridgely*, 1 *Har. & Gill*, 416.

In the case now before us, the plaintiff, by the witness Stone, proved the execution of the instrument sued upon, and having it in his possession, was entitled to recover on it in this action, unless it could be assailed on some of the grounds to which we have alluded. This we did not understand the counsel for the appellee to question; but they contended, that inasmuch as the paper bore on its face evident marks of *erasure* and *alteration*, they were entitled to introduce the testimony admitted in the court below and to which the appellant excepted. Judging from the frame of the prayers and the course of argument of counsel, we infer the cause was tried in the court below on the allegation, that the bill exhibited on its face marks of erasure and alteration; and it was in reference to this hypothesis, doubtless, that the testimony contained in the first and second exceptions was introduced. But unfortunately for the appellee, there is nothing appearing in the record going to show in the *slightest* particular the instrument had been subjected to *any* alteration, and therefore, so far as this court is concerned, it would be entirely gratuitous to assume it had undergone any change after its delivery. Whatever may have been the appearance of the paper at the trial, when, no doubt, it was submitted to the inspection of the jury and by them pronounced upon, there clearly is nothing before us to show it was not perfectly fair on its face. We can only decide the case according to the record, and if the party failed to have it put in a proper form, he must abide the consequences. If, in

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point of fact, it was obvious on inspection that the paper had been altered, it was easy to have it noticed in the exception, either by an agreement to that effect or by calling to the stand an expert in handwriting, and asking his opinion as to its appearance. Had this been done, and had the witness testified that the paper appeared to have been altered or any portion of it erased, we are of opinion the testimony in the first bill of exceptions, which was excepted to on the part of the plaintiff, would have been admissible as *tending* to show it had not been delivered in its then state. This evidence, however, it is proper to say, can only be admissible on the supposition, that it tends to show fraud on the part of the appellant, by showing his relations and dealings with the testator of the appellee. A witness on the stand could as readily give his opinion on the subject of alteration or erasure as could a juror in the jury box. We are of opinion, however, that under no state of circumstances was the will of William Sanders competent testimony. To allow it to be given in evidence, would be but to permit a party to testify in his own case and in his own behalf. As the case is presented to us on this record, we must reverse the ruling of the court both on the first and second exceptions.

As to the third exception: We think the court properly rejected the prayer offered on the part of the defendant. So far as this *record* shows, there is nothing in the case from which the jury could infer the hypothesis of the prayer. There is nothing from which they could infer, either that the single bill was delivered in blank or that it was delivered when payable to some other person than the plaintiff. As we have before stated, we have no judicial knowledge of the suspicious appearance of the paper, if such in fact existed. We are also of opinion, that the court properly rejected the second prayer of the plaintiff. Independently of the question of law involved in it, there was no evidence of which to predicate it. The name of the obligee is a *material* part of the deed, and delivery in blank is an insufficient delivery unless recognised after the blank is filled. This is the general principle. There are some exceptions to it, but none of them applicable to a case like the one before us. We also think the court erred in

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granting the third and fourth prayers of the plaintiff. There was no testimony to support them; nothing to show the single bill was delivered in blank, nor that there had been any erasure of the name of the original obligee and the substitution of that of the plaintiff, with the consent of the testator of the defendant.

We are of opinion, that the first, fifth and sixth prayers of the plaintiff, as offered by his counsel, ought to have been granted. Although there is nothing in the testimony to support the latter part of the first prayer, this circumstance does not vitiate it. It requires the jury to find all that is essential to the plaintiff's right of recovery. All that part of the prayer which follows the word "*unless*" is mere surplusage.

The other three prayers merely assert propositions which are recognized in all the cases, and which we did not understand counsel for the appellee to dispute. Their objection to them rested upon the theory, that they ignored the fact of alteration or erasure after the execution and delivery of the paper. Viewing this case as it is exhibited to us in the record, the qualification of these prayers, as insisted upon by counsel for the appellee, cannot be maintained for the reasons which we have already assigned.

Judgment reversed and procedendo awarded.

GEORGE T. JENKINS *vs.* ELLIS B. LONG and WILLIAM W. BYRNE.

By a written contract the defendants agreed to pay the plaintiff a salary of $1000, payable in monthly instalments of $50 each, "if he sells for them, to such parties as they shall approve, $40,000 during the year, and for all sales above that amount, (deducting bad and doubtful debts,) two per cent. additional." The defendants were also to have the right to dismiss him at any time before the end of the year "by giving him a month's notice to that effect." HELD:

That the *equitable* construction of this contract is, that if defendants dismiss the plaintiff before the end of the year the latter is entitled to compensation

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in proportion to the amount he was to have received for the *whole year*, including both the contingent compensation of *two per cent.* and the *proportionate* part of the $1000, *provided* his sales for the fraction of the year were at the *rate of* $40,000 *per annum*, deducting *bad debts*.

In construing contracts it is legitimate to suppose new and different aspects of the case from those which have actually arisen, in order to ascertain whether the rule of interpretation adopted makes every phase which the case *might assume* harmonise with each other.

Where a special contract to pay a certain sum for services for a year provides that the defendant may dismiss the plaintiff at any time during the year upon giving a month's notice, and the latter is *so dismissed;* the contract is not *violated* or *rescinded*, and the plaintiff must recover *upon it*, and cannot resort to a *quantum meruit*.

Evidence in a *quantum meruit* is admissible if the contract has been violated or abandoned by the defendant, or terminated by consent of both parties after it has been partly performed.

Evidence under a *quantum meruit* can only be resorted to where the special contract from having been either violated or rescinded is not sufficient to meet the case.

Where a contract has been fully executed, and nothing remains to be done but the payment of the money, the amount due may be recovered in *indebitatus assumpsit*, and in such case it is not necessary to declare upon or set out the special agreement.

But where the contract remains in full force it must, by virtue of its own terms, constitute the evidence of the agreement itself, even where the plaintiff relies alone upon the common counts; and no other evidence is admissible.

APPEAL from the Court of Common Pleas for Baltimore city.

Assumpsit by the appellant against the appellees. The declaration counts upon the special contract set out in the opinion of this court; and also contains a count for work and labor, and the common money counts. Plea *non assumpsit*.

Three exceptions were taken by the plaintiff to the rulings of the court below, (MARSHALL, J.,) all of which are fully stated in the opinion of this court. The verdict and judgment were in favor of the defendants and the plaintiff appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, J.

Benjamin C. Barroll for the appellant, argued:

1st. That the evidence contained in the first exception was

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admissible as being applicable to the count for work and labor. That the defendants having, by their own act, terminated the contract by discharging the plaintiff from their service, and having thus put it out of his power to perform his contract to its full extent it was *at his election* to go before the jury upon the *quantum meruit*. 1 *Greenlf. on Ev., secs.* 277, 287, 288. 7 *H. & J.*, 133, *Owings & Piet vs. Low.* 2 *Md. Rep.*, 38, *Bull vs. Schuberth.* 6 *H. & J.*, 38, *Watkins vs. Hodges, et al. Ibid*, 81, *Speake vs. Sheppard.* 9 *Gill*, 288, *Rodemer vs. Hazlehurst.* 2 *Fairfield*, 348, *Jewett vs. Weston.* And further, that the evidence was admissible as affording light to the court by which the true construction of the written contract could be better discerned. See sections from *Greenlf.*, cited above, and 1 *Mason*, 12, *Piesch vs. Dickson.*

2nd. As to the construction of the contract raised by the second and third exceptions the appellant insists, that its true construction is, that the plaintiff is entitled to claim compensation *pro rata, according to the amount of goods sold by him* and not according to *time* as set forth in the defendant's prayer granted by the court below. The contract divides itself into two distinct branches; 1st. It states, that if Jenkins sells to the specified amount of $40,000 he is to receive $1000, which is equivalent to *two and-a-half per cent.* on the $40,000. And this he is to receive without regard to the ultimate payment by the purchasers. And the mode of payment is specified, *viz.*, an advance of $350, and the balance in monthly instalments of $50 each. 2nd. Then with regard to the excess of sales over the $40,000. Upon such sales he is to receive a commission of *two per cent.* at the end of the year, after deducting all bad and doubtful debts, upon which the commission is not to be paid; the meaning and intention being, it is presumed, that the payment of commissions on such shall be suspended until their quality is definitely ascertained. As the sales did not reach the amount of $40,000 the second branch of the contract does not require consideration as to its construction. The contract makes no reference to the ordinary compensation for a clerk or salesman in a store, but has special reference to the *customers* which Jenkins should bring to the

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house of the defendants, and beyond this *custom* which he was to introduce he had nothing to do with the general business of the concern. It was for the profit arising to them from this special *custom* the defendants contracted to pay $1000, (or *two and-a-half per cent.*,) for the sale of goods to the extent of $40,000. The whole tenor of the agreement shows it was a *commission on sales*, (by way of salary,) they were to pay, such form of compensation being familiar among merchants in large cities. The contract itself uses the term "*commissions.*" The construction contended for by the appellant is natural, equitable, and that by which no undue advantage could be taken by either of the contracting parties. The construction contended for by the appellees would place Jenkins wholly in their power; they could discharge him as soon as the spring sales were over, (and the evidence proves they did so,) and then seek to allow him a compensation not based upon the amount of service rendered, as evidenced by the amount of goods sold, but a compensation based altogether upon time. According to their construction of the contract he might, in three months, have sold within a fraction of $40,000, been discharged, and be entitled to receive a paltry pittance instead of the $1000 for which he had bargained. If Jenkins in five months had sold $40,000 worth of goods there cannot be a doubt he would be entitled to claim the $1000 stipulated to be paid in the contract, which would be equivalent to *two and-a-half per cent.*, and as he has proved, that in five months he sold to the extent of $33,266.50, he insists he is entitled to claim at the same rate of *two and-a-half per cent. on that amount*, as he was debarred selling the further amount to make up the $40,000 by the act of the defendants and not by any default on his part.

Oliver Miller and *Robert C. Barry* for the appellees, argued:

1st. As to the first exception: By the terms of the contract *declared upon* and *offered in evidence* by the *plaintiff himself*, he was to receive a specific sum for the service he was to render, and without attempting to show any violation or rescision of this agreement, he sought to repudiate it altogether and

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recover upon a *quantum meruit*, by introducing evidence to establish an *implied agreement* totally inconsistent in its terms with those set out in the existing special agreement proved by *himself*, and thereby admitted to be in full force and of binding authority. The rule of law is well settled and *without exception*, that you cannot *imply a contract* where you prove an *express* contract. In *West vs. Flannagan*, 4 *Md. Rep.*, 56, this court has said: "As a general rule, implied contracts are *only* sustained in order to supply the place of *express agreements*, and we know of *no case* where the latter have been made to yield to the former, unless by the express or implied understanding of the parties that such should be the result. Indeed an *express agreement admitted to be in full force negatives an implied inconsistent agreement relating to the same subject matter.*" The fact that the declaration contains a count for *work and labor* does not affect the operation of the rule. In *Cushman vs. Sims*, 2 *H. & J.*, 352, the declaration contained the *common counts*, and the court held, that if there was a *special agreement proved* the plaintiff could not recover. In *Story on Cont.*, *sec.* 15, the rule is clearly and strongly stated: "A contract will be implied only when there is no *express contract*, '*expressum facit cessare tacitum.*' If therefore there be an express contract between the parties, the plaintiff in an action to recover the consideration for work and labor done must declare specially thereupon. So long therefore as that contract remains unrescinded he cannot recover the value of his services upon a *quantum meruit.*" See also *Chitty on Cont.*, 24, (*Ed. of* 1851,) where the same rule is also stated in the same strong language, and the doctrine announced that a party cannot be bound by an implied contract when he has made a specific contract, "*even although the latter be avoided by fraud.*" See also the cases cited by *Chitty* and *Story* in support of this general rule. But it is said the defendants *terminated* the contract by discharging the appellant from their service, and having put it out of his power to perform his contract to its full extent, it was *at his election* to go before the jury upon the *quantum meruit*. It is undoubtedly true, that if the defendant *violates* the contract or

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prevents the plaintiff from carrying it out, (which is equivalent to a *violation* on his part and a fraud upon the contract,) the latter may recover upon a *quantum meruit*. But this rule is confined to cases of *violated contracts* and of *fraud*. Such is not the case here. In discharging the plaintiff the defendants did not *violate* the contract, but simply exercised their unquestioned rights *under the contract*. The plaintiff's recovery for what is due him must therefore be *under* and not *outside* of the contract. The cases cited in 2 *H. & G.*, 133; 6 *Do.*, 38, 81, and 2 *Md. Rep.*, 38, are not in conflict with, but *sustain* all the views expressed above. But it is further said, this evidence was admissible as affording *light* by which the true construction of the written contract could be better discerned. It is difficult to understand how evidence that the value of plaintiff's services for one year was worth from $2500 to $3000, can throw *light* upon the construction of a *written contract*, by which the value of those services for that period was fixed at $1000 if he sold $40,000 worth of goods, and two per cent. commissions on all sales above that amount. If such evidence can be admitted for such a purpose, it is difficult to understand the *use of a written agreement* in any case. If there be any ambiguity in the terms of this contract, it is *patent* upon the face of the instrument itself, and cannot be explained or removed by *extrinsic evidence*. 4 *Md. Rep.*, 498, *Marshall vs. Haney*. Nor is it a case in which evidence of *usage* would be admissible, for such evidence is never admissible to vary or contradict the clear and manifest signification of the terms used by the contracting parties to express their meaning, *nor to oppose or alter a general principle or rule of law*. 6 *Md. Rep.*, 37, *Foley & Woodside, vs. Mason & Son*. "*A usage of trade cannot be set up in contravention of an express contract.*" *Chitty on Cont.*, 24, (*Ed. of* 1851.) We therefore insist that the ruling of the court upon the *first exception* cannot be reversed, for with such reversal would go a reversal of *elementary text law*.

2nd. The second and third exceptions relate to the construction of the contract in question. Upon these we insist: 1st. That the true construction of this contract is that given to

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it by the court below in granting defendants' prayer. The plaintiff was to receive a *salary* of $1000 if he sold during the year $40,000 to such parties as the defendants should approve, and *after selling* $40,000 he was to receive two per cent. commissions on all sums over and above that amount, all bad and doubtful debts, however, to be first deducted. The $1000 *salary* was to be drawn in monthly instalments. The commission of two per cent. on sums over $40,000 was to be paid at the end of the year, when the amount over and above $40,000 should be ascertained. There can be no doubt that the appellant was not entitled to receive aught but the $1000, *if during the entire year* he had sold only $40,000. It is admitted he sold but $33,266.50 up to the 1st of June 1850, when, under the notice given by defendants, in *pursuance of a provision of the contract*, he left their services. The contingency had not then happened by which the plaintiff was entitled to receive any commissions on his sales. He was entitled to draw his *salary* at the rate of $1000 per annum, and no more, because he had not then even sold $40,000, which he was bound to sell before he could make any claim *for commissions*. The sale of $40,000 was clearly a *condition precedent* to the right to receive any *commissions*. If he was to receive a *pro rata* compensation on the sales made, without any reference to the time of service or amount sold, then all that part (which is by far the greater and most important portion) of the contract relating to the *salary* of $1000, and the sale of the $40,000 is *utterly without meaning*, and must *be stricken* from the instrument. We therefore confidently insist that the *pro rata* proportion of the salary of $1000, having reference to the *time* the plaintiff was in the defendants' service, is all that he can claim, and all that in equity and justice he is entitled to. The above is the construction given to the contract by the court below, and is the most favorable for the appellant which, as we conceive, can possibly be placed upon it. But we insist, 2ndly, that this is *more* than, upon a strict and legal construction of the contract, the appellant is entitled to ask. This court must look at the contract as it stands, and put such a construction upon it as the *plain import* of its lan-

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guage demands, regardless of any considerations of *hardship* which such a construction may inflict upon the parties. Now what is the plain import of the language here used? We say the plaintiff can recover neither *salary nor commissions, unless he* remained in the service of the defendants, *at their desire*, till the 1st of January 1851, *and* sold for them $40,000 to such parties as they should approve. He did *neither*. How then can he recover anything under this agreement? The contract is, that the defendants "agree to pay Mr. Jenkins a salary of $1000, IF *he sells for them, to such parties as they shall approve*, $40,000 *during the year*." Is there any difficulty in construing this language? *If* he sells the $40,000 during the year, he is to recive *his salary*, if not he is to receive *nothing*. He must perform the *condition* before his right of action *accrues*. It is said he was prevented from performing this condition by the act of the defendants. This is true, but it is equally true that in so doing they *violated* no stipulation of the agreement, but on the other hand merely exercised a right which the plaintiff, by the contract, agreed they should have the power to exercise. He was to remain in their service till the 1st of January 1851, if *they so desired it*, and they were to have the right to dispense with his services *at any time previously by giving him a month's notice to that effect*. This notice *was given* and he left in pursuance of it before he had sold the $40,000. They were not bound to assign any reason for dismissing him; this was left to their own uncontrolled and arbitrary discretion. It may be said this construction makes the contract a harsh, inequitable and one-sided bargain, and puts the plaintiff entirely in the power of the defendants; but the conclusive answer is, you *so stipulated* with "*your eyes open to the rights and powers conferred by the contract, both upon yourself and the defendants.*" 4 *Md. Rep.*, 57, *West vs. Flannagan*. Because a party has entered into an improvident bargain, it is no reason why he should ask relief in a *court of law*. It was a case of greater *hardship* in *Wagner vs. White*, 4 *H. & J.*, 564, where the tenant was held responsible for the rent, though the house was torn down by a mob which he could not resist, and yet the court there say, "the defendant

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has bound himself by *express agreement*, without any reservation or exception, to pay the rent, and he *must stand by his contract*. In *Rodemer vs. Hazlehurst*, 9 *Gill*, 292, a contract was made which the court called "*peculiar and one-sided*," by which the right to rescind it, upon *three days' notice*, was given to *one side only*, and the court held the plaintiff was released, because the required *notice* was not given. Here the *month's notice was given*, and there are no *restrictions* upon the right of the defendants to dismiss the plaintiff from their service at *any time* they chose, and without assigning any reason therefor. The only stipulation in the contract that in the least militates against this view, is that which provides that the salary of $1000 is to be drawn in *monthly instalments*, commencing at the end of January. But it is submitted that this clause is controlled and modified by the great and controlling condition, which, undoubtedly, was the consideration moving to the defendants in the execution of the contract, and upon which alone they agreed to pay the salary, viz., "*the sale by the plaintiff of* $40,000 *during the year;*" and that each monthly payment was made subject to the condition, that this part of the contract was to be complied with, and in case of failure so to comply, was liable to be refunded by the plaintiff, or to be recovered from him by defendants in case he should refuse to refund.

MASON, J., delivered the opinion of this court.

This is an action of *assumpsit*, the declaration in which contains a count upon a special agreement, a count for work and labor and the common money counts.

At the trial the plaintiff proved, that in virtue of a written contract, which was afterwards produced, he had been in the employment of the defendants from the 1st of January 1850 to the 1st of June 1850, a period of five months, and during that time had sold for them goods to the amount of $33,266.50, which had been duly delivered to the purchasers. He also proved that a written notice from the defendants, dispensing with his services, had been given to him thirty days prior to 1st of June, and that he left their employment in conformity

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with such notice. The plaintiff then gave in evidence the written contract between himself and defendants, as follows:

"*Memorandum* of understanding between Long & Byrne and George T. Jenkins for the year eighteen hundred and fifty (1850.) The first named party agree to pay Mr. Jenkins a salary of one thousand dollars if he sells for them to such parties as they shall approve, forty thousand during the year, and for all sales over and above that amount, (2 p. c.) two per cent. additional, the excess over the one thousand dollars to be paid at the end of the year, when the amount of sales shall be ascertained, and the thousand dollars to be drawn in monthly instalments of fifty dollars per month, commencing at end of January, three hundred and fifty dollars being already advanced on next year's salary. Sales made by Mr. Jenkins personally, and orders from his friends and induced by his influence, (the packing of whose goods are to be superintended by him,) to be considered as constituting the amount of his sales, after deducting all bad and doubtful debts at the end of the year, which, under no circumstances, can the two per cent. commission be paid upon. It being further understood, that George T. Jenkins binds himself, under a penalty of five hundred dollars, to continue in the service of Long & Byrne till the 1st of January 1851, if they so desire it, and that they have the right to dispense with his services at any time previously by giving him a month's notice to that effect, to which agreement both parties pledged themselves, this 14th day of November 1849.

(Signed,) LONG & BYRNE, *by E. B. Long*,
GEO. T. JENKINS."

The plaintiff then offered to prove by several witnesses his competency and character as a business man, and the value of his services in connection with the dry goods business, (being the business in which Long & Byrne were engaged in the year 1850,) and particularly the value of his services to the defendants from the 1st of January 1850 to the 1st of June 1850. And offered further to prove his services worth for the year 1850 from $2500 to $3000. But the court refused to allow the testimony to go to the jury and ruled the same incompetent, which ruling forms the matter of the plaintiff's first exception.

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The defendants then proved that the plaintiff had received from them $650.50; and thereupon the case was closed.

The plaintiff then asked the court to instruct the jury, "that the true and legal construction of the contract offered in evidence is, that the plaintiff is entitled to receive for his services a *pro rata* compensation, to be estimated upon the amount of goods sold by him while in the employment of the defendants." But the court refused so to do and the plaintiff excepted.

The defendants then prayed the court, &c., "that if the jury find from the evidence that the defendants contracted with plaintiff, as set out in the contract, and that plaintiff entered into the service of the defendants on the 1st of January and remained in their service till 1st of June, (five months,) and then left their service in consequence of notice from defendants, in pursuance of said contract, the plaintiff is only entitled to recover in this action at the rate of $1000 *per annum* for the time he was so in defendants' service, and that from such amount must be deducted the amount of defendants' bill filed in this case and admitted by plaintiff to be correct." This prayer was granted and the plaintiff also excepted.

This case depends upon the proper construction of the written contract between the plaintiff and defendants. It is not a case where evidence in a *quantum meruit* would be admissible as if the contract had been violated or abandoned by the defendants, or where it had been terminated even by the consent of both parties after it was only partly performed. Such were the cases of *Watkins vs. Hodges*, 6 *Har. & Johns.*, 38; *Howard vs. Rail Road Co.*, 1 *Gill*, 311; *Rodemer vs. Hazlehurst & Co.*, 9 *Gill*, 288; *Bull vs. Schuberth*, 2 *Md. Rep.*, 38; *Balt. & O. R. R. Co. vs. Resley*, 7 *Md. Rep.*, 297.

The defendants did not violate the terms of the agreement in dismissing the plaintiff, but in doing so they acted in strict conformity with them. Notwithstanding this dismissal of the plaintiff, it was nevertheless as much a perfectly executed and an entire contract between both parties as if it had continued for the whole year and as if the plaintiff had sold $40,000 worth of goods, and it was, therefore, as much the subject of

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a special action. Evidence under a *quantum meruit* is only resorted to where the special contract, from its having been either violated or rescinded, is not sufficient to meet the case. But here such is not the fact. The construction which we place upon this contract makes it ascertain, by force of its own terms, the precise amount of compensation which is due the plaintiff, and therefore there is no necessity to resort to evidence out side of the contract to ascertain, upon a *quantum meruit*, what that compensation should be or what the services were worth.

The question involved in the first exception is not one of *pleading* but one of *evidence*. There is no doubt that where the contract has been fully executed and nothing remains to be done but the payment of the money, the amount due can be recovered in *indebitatus assumpsit*, and it is not necessary in such case to declare upon or set out the special agreement. But where the contract remains in full force, as in this case, it must constitute, by virtue of its own terms, the evidence of the agreement itself, even where the plaintiff relies alone upon the common money counts, and no other evidence will be admissible.

Surely the defendants were entitled to whatever advantage they may derive from the provision in the contract, which authorises them to terminate it by dismissing the plaintiff after thirty days' notice. But if by doing so, the defendants are to be treated as having so far abandoned the contract as to permit the plaintiff to resort to evidence in *indebitatus assumpsit* instead of the special contract, what better off are they than if no such provision was embraced in the agreement? In other words, the effect upon the defendants would be precisely the same, whether, in dismissing the plaintiff, they violated the contract, or whether, in doing so, they pursued its strict letter and spirit.

We are, therefore, of the opinion, that the evidence embraced in the first bill of exceptions was properly rejected. It sought to substitute an implied agreement in the place of the positive contract between the parties, which, as we shall presently show, though executed, was still in full force and virtue, unrescinded or unviolated by either party.

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The equitable construction of this contract is evidently this: If the defendants should think proper, before the end of the year, to terminate the contract and dismiss the plaintiff, the latter would be entitled to compensation for the fraction of the year in proportion to the amount he was to have received for the whole year, and this would include as well the contingent compensation of two per cent. as the proportionate part of the $1000; provided, however, that the sales made for the fraction of the year had been at the rate of $40,000 per annum. Thus, to entitle the plaintiff to recover for the five months he was in the defendants' service, it must appear that he sold goods in that time to the amount, at least, of $16,666.66, which sum bears the same proportion to $40,000 that five months bear to one year. This having been shown, he became at once entitled to his share of the $1000 in the proportion also of five to twelve, which is $416.66⅔. By the admissions in the record it appears, that the plaintiff, in the five months, sold goods to the amount of $33,266.50, which was an excess of $16,599.83 over the sum necessary to entitle him to claim compensation. Upon this excess he was entitled to two per cent. commissions, which, provided there were no bad debts, would amount to $331.99, which, added to the proportion due on his fixed salary, would make the plaintiff's claim, on the 1st of June 1850, the time he was dismissed, $748.65⅔. Deducting the account of the defendants, which is admitted to be $650.50, the balance due the plaintiff would be $98.15⅔, with interest. As before said, this sum would be subject to be reduced upon proof that any portion of the sales were bad debts, upon which, by the terms of the contract, he was to have no commissions.

From what we have said, it follows, that the construction of the contract contended for by the appellee, namely, that there could be no recovery in this case, either of any fraction of the fixed salary or the contingent per centum until after an actual sale of $40,000 worth of goods had been made, is wholly untenable. The opposite suggestion, that the appellant would be entitled to 2½ per cent. on the sales actually made while they continued below $40,000, which is at the rate of $1000 upon $40,000 is equally unsupported by the terms of the agreement. The

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effect of the latter construction would be to allow the plaintiff a greater rate of compensation for the five months than he would have been entitled to if he had continued in service till the end of the year, and had sold at the same ratio; whereas it is manifest from the terms of the agreement, that the contract, although made for a whole year, nevertheless contemplated a case of a segregation or division of it into fractions of a year, and that the compensation to be allowed for such fraction would be determined by the standard adopted for the whole year.

It is proper in construing contracts, not to confine ourselves to the particular state of case that has arisen under it, but it is legitimate for us to test the correctness of our impressions upon the particular state of facts that may be presented by the record, by supposing new and different aspects of the case, in order to ascertain whether the rule of interpretation adopted makes every phase which the case might assume harmonise with each other.

That the view we have taken of this contract is the correct one, appears manifest to our minds from the following illustrations: Suppose the plaintiff had sold goods, say at the rate of $200,000 for the year, the commissions on the excess over $40,000, added to his fixed salary, would amount to $4200. To avoid the payment of these commissions it would be only necessary for the defendants to give notice, on the 30th of November, for the purpose of dismissing the plaintiff, and thus on the 30th of December, one day only before his claim for the full year's compensation would be consummated, he would find himself bereft of the fruits of his labors, (the commissions,) for the previous 364 days of the year, and that too without any default or misconduct on his part. This might be inevitably one of the results of the construction contended for by the appellee.

Again, suppose the defendants should think proper, in two months, to dismiss the plaintiff, and that in that time he had sold $40,000 worth of goods, if the construction contended for by him be correct, he would be entitled to $1000, whereas by the rule we have adopted he would be entitled to only

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$833.33⅓. If it were otherwise and our rule of construction were not adopted the contract would be without mutuality, and would be susceptible of great injustice.

The contract further provides, that "the thousand dollars to be drawn in monthly instalments of fifty dollars per month." This provision of course rests upon the assumption, that the sales were to be at least at *the rate* of $40,000 per annum; and it furnishes another illustration, that notwithstanding the contract might be terminated before the end of the year, still it was, for the fraction of the year in which it might remain in force, to be regarded as an entire, executed contract.

The construction placed upon this contract, by the court below, being in our judgment erroneous, we must reverse the judgment and remand the cause, in order that the jury, upon a subsequent trial, may be instructed in accordance with the views herein expressed.

Judgment reversed and procedendo awarded.

ECCLESTON, J., delivered the following separate opinion:

By the terms of the agreement the clerk was to receive as a salary $1000, if he sold, to such persons as the defendants should approve, $40,000 worth of goods during the year, and two per cent. for all sales above that amount. At the end of five months the clerk was discharged, up to which time he had sold $33,266.50, from which no abatement is claimed on account of sales to improper parties. The sales being made within the year, and not exceeding $40,000, according to my construction of the contract, and in view of the circumstances disclosed by the record, I think the clerk had a right to claim 2½ per cent. upon $33,266.50, because a salary of $1000 for selling goods amounting to $40,000, is at the rate of 2½ per cent. on the latter sum. Of course the defendants should be credited with the payments made by them.

I concur with the majority of the court in reversing the judgment, but not in their construction of the contract.

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JOSEPH BLIMLINE *vs.* DAVID COHEN.

The 10th sec. of the 4th art. of the constitution giving to the Court of Common Pleas "jurisdiction in all cases where the *debt or damage* claimed shall be over $100, and shall not exceed $500," does not confer upon that court any original jurisdiction in actions of *replevin*.

APPEAL from the Court of Common Pleas for Baltimore city.

Replevin by the appellant, to recover certain goods, merchandise and chattels contained in a store in Baltimore city, which had been mortgaged by the appellant to the appellee, to secure the sum of $500. The damages claimed in the declaration were $500. The property as appraised in the schedule annexed to the return of the writ amounted to $538.05. Pleas, *non cepit* and property in defendant.

The verdict and judgment were in favor of the defendant upon an instruction granted by the court, (MARSHALL, J.,) that the plaintiff was not entitled to recover, if the jury believe that the goods actually taken and delivered to the plaintiff were then of the value of more than $500, to which ruling, as well as to the refusal to grant several prayers offered by him, the plaintiff excepted and appealed. The ground upon which this court based its decision renders it unnecessary to state the questions which were presented by the prayers or the arguments of counsel thereon.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, J.; by *Wilson N. Carr* and *Wm. Pinkney Whyte* for the appellant, and *Geo. Wm. Brown* for the appellee.

LE GRAND, C. J., delivered the opinion of this court.

In the view we have of this case it is not necessary we should examine the various points raised and discussed by counsel. We are of the opinion that the Court of Common Pleas has not any original jurisdiction in actions of *replevin*. Its jurisdiction is limited and defined by the 10th section of the 4th article of the constitution. That section declares the Court of Common Pleas "shall have jurisdiction in all suits

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where the *debt or damage* claimed shall be over one hundred dollars, and shall not exceed five hundred dollars." Language similar to this in the old acts of Assembly, giving jurisdiction to justices of the peace, was never considered as conferring on them jurisdiction in actions of *replevin*, and it was therefore found necessary to pass other acts conferring it in direct terms.

Judgment affirmed.

FREDERICK DIETUS *vs.* FRANCIS J. FUSS, Trustee of GOTLIEB DIETUS.

A prayer which leaves it to the jury to infer that a bill of sale was fraudulent and void as to creditors, from the fact, *simply*, that the grantor, at the time he executed it, was indebted to *several persons*, whose debts remained unpaid, without submitting to them any question as to the *amount* of such indebtedness or the extent of the grantor's means, or whether he was in embarrassed or insolvent circumstances, is defective.

Trover cannot be maintained without a conversion either direct or constructive, and which must be proved either directly or by inference.

When the plaintiff fails to prove an actual conversion, he must give evidence of a *demand and refusal* made at a time when the defendant had the power to give up the goods.

A demand and refusal are only evidence of a prior conversion, which may be explained or rebutted by evidence to the contrary.

Where a party in insolvent circumstances sells property, and his *vendee* sells or disposes of it *after* the vendor petitions, or if *before* petition and while the goods are in his possession the vendor makes a *second sale*, which the first vendee subsequent to the petition *adopts or sanctions*, it will amount to a conversion by such vendee without a demand and refusal.

But the mere fact that a party before he petitions makes a fraudulent bill of sale of property, without any proof as to an actual conversion or a demand and refusal, will not justify a verdict in *trover* in favor of the insolvent's trustee against the grantee.

A prayer that the insolvent trustee could not recover against such grantee, unless the jury believe the bill of sale void under the *insolvent laws*, is defective, because though not void under those laws, the deed may still be void under the *statute of Elizabeth*.

The *particular day* named in the *nar*, either in reference to the possession of the party whose goods have been converted or to the conversion, is an *immaterial averment* as to *time*.

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APPEAL from the Superior Court of Baltimore city.

Trover by the appellee, as permanent trustee in insolvency of Gotlieb Dietus, brought on the 8th of July 1851, against the appellant, to recover the value of twenty-three cows, four horses, seven hogs, one milk-wagon, and a lot of household and kitchen furniture, which the *nar* alleges the said Gotlieb was possessed of on the 11th of February 1851, and on the same day casually lost, and which on the same day came to the possession of the defendant by finding, and were converted by him to his own use on the 26th of June 1851. The *nar* also alleges, that on the 11th of February 1851, said Gotlieb petitioned for the benefit of the insolvent laws, and the plaintiff was appointed his permanent trustee, and filed a duly approved bond as such on the 25th of June 1851. Plea, *non cul.*

Exception. It was admitted that Gotlieb Dietus petitioned for the benefit of the insolvent laws on the 11th of February 1851, and that plaintiff was appointed his permanent trustee and duly bonded as such on the 25th of June 1851. The plaintiff then proved that said Gotlieb had not obtained his final discharge, and then called several witnesses who proved substantially the following facts: that said Gotlieb carried on the milk-business, and his property was appraised, at the instance of the defendant, in March or April 1851, at $900 or $1000; that not long prior to his application for the benefit of the insolvent laws he was hard pressed for money, borrowed small sums, said his brother, the defendant, had helped him out several times and he was afraid to apply to him again; that in the spring of 1851 he was sued and said he must petition if the judgment could not be superseded; that he carried on his business as usual up to time of his application and was in possession of his stock, &c.; that on the 25th of June 1851, plaintiff made a demand in writing upon the defendant for the property in dispute which was received by him from Gotlieb, and particularly described in a bill of sale from Gotlieb to defendant, dated the 13th of June 1850, to which defendant replied that he would not give it up. He also offered in evidence several notes given by Gotlieb for debts dated in 1850 and 1854.

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The defendant then offered in evidence the bill of sale of the property in question (which was duly recorded) from Gotlieb to him, dated the 30th of June 1850, in consideration of $1000 in hand paid. He then proved by several witnesses, that Gotlieb had been several times in execution on other judgments than that on which when arrested he petitioned; that he carried on his business up to the time of his arrest and was in his milk-wagon when arrested, and on the same morning petitioned; that defendant was a butcher and did not carry on the milk-business. He then proved by Sacks, that on the 28th of January 1851, Gotlieb sold to witness a lot of cows, horses, hogs, milk-wagon, and other property appertaining to his milk concern, for $1000, of which $400 was paid by the extinguishment of a debt due by Gotlieb to him, which had been running for several years, and for which defendant was security, and the remaining $600 was paid to defendant; that defendant was not present at this sale; that at that time Gotlieb had the property in his possession, and shortly thereafter delivered possession thereof to witness and moved from the place, carrying with him the articles he had not sold; that defendant told witness to sell his brother, Gotlieb, cows and he would pay for them.

The plaintiff then recalled a witness, who proved that he heard defendant tell the plaintiff, who inquired of him why he had taken so large a bill of sale, as Gotlieb could not owe so much? that he had taken it so that none of the creditors should lose any thing. The plaintiff then offered three prayers, as follows:

1st. If the jury find from the evidence that at the time the bill of sale offered in evidence was made by Gotlieb Dietus he was indebted to several persons, who are yet unpaid, and that after its execution he remained in possession of the property therein mentioned as before, and prosecuted his business as milk-dealer up to a short time before his application for the benefit of the insolvent laws, and that the consideration mentioned in said bill of sale was not *bona fide* paid as therein stated, in money or in satisfaction of some existing debt due by the grantor to the grantee, or in other equivalent value,

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and that the contract between Gotlieb and Sacks was made with the privity of the defendant, then the jury may infer that said bill of sale was made to hinder and delay the creditors of said Gotlieb, and if they make such inference, it is fraudulent and void as against the creditors of said insolvent.

2nd. If they find the facts stated in the first prayer and draw the inference thereby authorised, and further find that before the institution of this suit the plaintiff was appointed permanent trustee of said Gotlieb Dietus, and gave bond as such, which was afterwards duly approved, and that thereafter he demanded of the defendant the property mentioned in said bill of sale, and that defendant refused to deliver the same, then plaintiff is entitled to a verdict for such amount as the jury may find from the evidence to be the value of the property in question.

3rd. This prayer is fully stated in the opinion of this court.

The defendant then offered the five following prayers:

1st. This prayer contains the proposition which is also fully stated in the opinion of this court.

2nd. If the jury find from the evidence that defendant came into possession of the chattels in question prior to Gotlieb's application for the benefit of the insolvent laws, under the bill of sale of the 13th of June 1850, and that such possession ended prior to said application, in consequence of no act or consent of the defendant, but of the acts of Gotlieb; and further, that at the time of the alleged demand and refusal the defendant had not possession or control of said chattels, they must find a verdict for the defendant.

3rd. This prayer is fully stated in the opinion of this court.

4th. If the jury shall find from the evidence that defendant came into possession of the goods and chattels alleged to be converted under a sale or transfer from Gotlieb Dietus prior to his application for insolvency, and that plaintiff, since his appointment as trustee of said Gotlieb, has made no demand of said goods and chattels at a time when defendant had possession or control of them, then, though they believe such sale or transfer was made in contemplation of insolvency, they must find for the defendant.

5th. This prayer is fully stated in the opinion of this court.

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The court below, (FRICK, J.,) granted all the prayers of the plaintiff and rejected all those offered by the defendant, and then gave the instruction set out in the opinion of this court. To which instruction by the court, as well as to the granting of each of the plaintiff's and the rejection of each of the defendant's prayers, the defendant excepted, and the verdict and judgment being against him, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, J.

James A. Buchanan and *Chas. J. M. Gwinn* for the appellant, argued:

1st. That the plaintiff's *first prayer* is erroneous in this:—1st. That it makes the mere fact of an indebtedness of Gotlieb Dietus at the time of the execution of the bill of sale a circumstance from which the jury may infer it was intended to hinder and delay his creditors, without limiting the instruction in such a manner as that the jury should consider the *amount* of such indebtedness, its proportion to the whole property conveyed, the presence or absence of proof as to his possession of other property sufficient to pay such outstanding demands. 5 *Gill*, 449, *Worthington, et al., vs. Shipley*. Under the law of this part of the instruction, if the jury had found an indebtedness on the part of Gotlieb of *one dollar*, the technical requirement of the instruction would have been satisfied. 2nd. It makes Gotlieb's remaining in possession of the chattels conveyed a circumstance from which the jury may also infer such intent to hinder and delay creditors, when, by the provisions of the act of 1729, ch. 8, sec. 5, the bill of sale having been duly recorded, the grantor's remaining in possession was in exact conformity with law and good faith. 3rd. It improperly makes the prosecution of his business by Gotlieb with the articles so legally in his possession up to the time of his application, a circumstance from which the jury may infer an intent to hinder and delay his creditors in executing the bill of sale. 4th. It authorises the jury to find an intent to hinder and delay creditors, if they believe the *very* pecuniary consideration

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of $1000 was not paid by the defendant to Gotlieb either in its *exact* sum of money, or in its *exact* sum in satisfaction of existing debts, or in some other *exact* equivalent value, which was well calculated to mislead the jury, as it did not leave to them the simple determination of the inquiry, whether the consideration was a valuable one or not, but left them free to find for the plaintiff if defendant had paid any *less* sum than $1000 or was the creditor of Gotlieb in any *less* sum. 5th. It authorises the jury to find the privity of the defendant to the sale made to Sacks to be a circumstance of fraud, when such sale was right and proper if it had the assent of the defendant, since, by the recording of the bill of sale, the right of property in the chattels transferred was vested in him and the right of possession remained in Gotlieb so long as it was not claimed by defendant, and in the disposition of the property with the consent of the defendant, Gotlieb can only be intended to have acted as his proper agent and by his permission. 6th. The question should not have been upon the intent, as it is here inferentially made, with which the defendant took the bill of sale, but upon the intent with which Gotlieb made it and the consideration upon which it was made; for if made without intent to hinder and delay creditors and for a valuable consideration, the assent given afterwards by the defendant to the disposition of the property could not affect the validity of the bill of sale in its inception and execution. 7th. The conduct of the defendant subsequent to the execution of the bill of sale with regard to the disposition of the property conveyed to him, making no part of the *res gestæ*, was not a proper circumstance to be left to the jury as in any sense an *indicium* of fraud. 3 *Md. Rep.*, 77, *Stewart vs. Redditt.*

2nd. The plaintiff's *second prayer* is also erroneous:—1st. Because it is based upon the first prayer which we have shown to be defective. 2nd, for the further reason, that it makes the mere fact of demand and refusal evidence of a conversion, although it was in proof the property was not at the time of such demand and refusal in the possession or under the control of the defendant, and never had been in his possession. 3rd. Because in order to make a demand and refusal evidence of a

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conversion, it must be proved that defendant had at the time of such demand and refusal the possession or control of the property demanded of him. 2 *H. Bl. Rep.*, 135, *Nixon vs. Jenkins*. 2 *Greenlf. on Ev., sec.* 644. 11 *Mees. & Wels.*, 362, *Edwards vs. Hooper*. 9 *Barn. & Cres.*, 764, *Jones vs. Fbrt*. 1 *Camp.*, 439, *Smith vs. Young*. 13 *Pick.*, 294, *Vincent vs. Cornell*. 3 *Metcalf*, 6, *Leonard vs. Tidd*.

3rd. The plaintiff's *third prayer* is defective, because it assumes that the mere invalidity of the deed to the defendant gave the plaintiff a right to recover in trover, without leaving it to the jury to find whether there had been any actual conversion of the property by the defendant, or any demand made on, and refusal by him, if he had it in his possession; or without leaving them to find whether the defendant had ever been in the actual possession of the property so conveyed to him by the bill of sale; and because, in fine, the prayer assumes that a right to the possession of the chattels or to their proceeds was of itself sufficient to maintain trover, whereas, on the contrary, the prayer is not law, because it does not direct the jury to find such demand and refusal or any fact equivalent thereto. *Vide* cases cited on the second point.

4th. The defendant's *first prayer* presented the *true rule* to enable the jury to test the *validity* of the bill of sale, and should have been granted. 5 *G. & J.*, 377, *Hickley vs. Farmers & Merchants Bank*. 6 *Do.*, 323, *Crawfords vs. Taylor*. *Act of* 1834, *ch.* 293, *sec.* 1. 7 *G. & J.*, 170, *Dulaney vs. Hoffman*. 6 *Do.*, 205, *State vs. Bank of Md. Ibid.*, 363, *Union Bank vs. Ellicott*. 1 *Gill*, 412, *Cole vs. Albers & Runge*. 4 *Do.*, 38, *Wheeler vs. Stone*. 7 *Do.*, 378, *Gardner vs. Lewis*. *Ibid.*, 439, *Stewart vs. Union Bank*.

5th. Our *second prayer* presented the true law of the case. *Vide* authorities under the second point, and 6 *Barbour*, 436, *Kelsey vs. Griswold*.

6th. The court erred in rejecting our *third prayer*, for the reason that the defendant could not be made liable when the property had been taken from him by Gotlieb before he was insolvent, and before his trustee had acquired any right to the

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property in question. 12 *G. & J.*, 341, *Repp vs. Repp.* 11 *Mees. & Wels.*, 362, *Edwards vs. Hooper.* And for the further reason that the plaintiff, in his declaration, avers that the defendant converted Gotlieb's property to his own use on the 11th of February 1851, and the defendant was not liable if he could show that Gotlieb had taken the property from him prior to February 11th, 1851, when Gotlieb applied for the benefit of the insolvent laws.

7th. Our *fourth prayer* was also improperly rejected for the reason, that if the jury found the defendant came into possession of the property in the manner stated in the prayer, he could not be guilty of a conversion until it was demanded of him and until he had refused to give it up. And in order to make a demand and refusal evidence of a conversion, the plaintiff must show that at the time it was made the defendant had possession or control of the property demanded. 2 *Greenlf. on Ev.*, *sec.* 644. 2 *H. Bl. Rep.*, 134, *Nixon vs. Jenkins.* 13 *Pick.*, 294, *Vincent vs. Cornell.* 5 *Md. Rep.*, 433, *Stewart vs. Spedden.*

8th. Our *fifth prayer* should have been granted, for the reason that the plaintiff avers in his declaration that the property in the goods and chattels in question was in Gotlieb, on the 11th of February 1851, when the defendant converted them to his own use, and this must be *proved*, because a prior conversion is not sufficient. 11 *Mees. & Wels.*, 362, *Edwards vs. Hooper.* 2 *Younge & Jervis*, 101, *Balme vs. Hutton.* 4 *Md. Rep.*, 352, *Mayor & C. C. of Balto. vs. Norman.*

9th. The court erred in its instruction, because it was calculated to, and doubtless did, mislead the jury; for under it they could find a verdict for the plaintiff if they believed the bill of sale invalid, although they should not have found that defendant was ever in possession of the goods conveyed to him by it, or that he ever converted them to his own use, or though they should believe there had been no sufficient or any demand or refusal, and though they should find the goods had been sold to Sacks without authority from the defendant, or had been, in fact, converted to the use of Gotlieb by the single act of Gotlieb, and because upon this instruction, which is avowed by the court

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to be the law of the whole case, no rule was furnished to the jury by which they could assess the damages in the case. 2 *Greenlf. on Ev., sec.* 649. 5 *Md. Rep.*, 438, *Stewart vs. Spedden.* 7 *H. & J.*, 257, *Bohn vs. Headley.*

10th. That as from the proof there can be no recovery, a *procedendo* ought to be refused if judgment is reversed. 7 *H. & J.*, 251, *Bohn vs. Headley.* 6 *Md. Rep.*, 113, *Gittings vs. Mayhew.* 6 *Gill*, 191, *Emery vs. Gault.*

John J. Snyder and *David Stewart* for the appellee, argued:

1st. That there was evidence to go to the jury, that the bill of sale made by the insolvent to the defendant was not made fairly and *bona fide*, and the plaintiff therefore could recover the property in *trover.* 1 *Md. Rep.*, 455, *Waters vs. Dashiell.*

2nd. That the demand made by the plaintiff upon the defendant for the property in the written demand mentioned, and the unqualified refusal of the defendant to deliver the same was evidence of the previous conversion by the defendant of the property referred to in the demand. 7 *Eng. C. L. Rep.*, 278, *Wilton vs. Girdstone.*

3rd. That the contract between the insolvent and Sacks, if made with the privity of the defendant, was evidence from which the jury might infer, that the bill of sale set up by the defence was made to hinder and delay the creditors of the insolvent, and that there is in the record abundant evidence of such privity on the part of the defendant.

4th. That the rights of the plaintiff have relation back to the date of the application of the insolvent, and that if the bill of sale was fraudulent the defendant is responsible to the plaintiff for any conversion of the property whereby it was withheld from the plaintiff as trustee, though such conversion may have taken place before the day of the demand and refusal. 1 *Term. Rep.*, 157, *Thompson vs. Councel.* 5 *Bingh.*, 597, *Price vs. Helyar.* 3 *Camp.*, 396, *Wyatt vs. Blades. Smith's Lead. Cases*, 237. 6 *East*, 540, *McCombie vs. Davies.* 7 *Johns.*, 257, *Bristol vs. Burt.* 5 *Cowen.*, 323, *Reynolds vs. Shuler.*

5th. That the sale by the defendant or with his consent,

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after the application of *Gotlieb Dietus* for the benefit of the insolvent laws, was an actual conversion, and that a demand and refusal were unnecessary. 5 *East*, 407, *Bloxam vs. Hubbard*. 1 *Eng. C. L. Rep.*, 439, *Craven vs. Ryder*. 14 *Do.*, 222, *Yates vs. Carnsew*. 4 *Blackford*, 397, *Coffin vs. Anderson*. 1 *Burr*, 20, *Cooper vs. Chitty*. 23 *Eng. C. L. Rep.*, 338, *Balme vs. Hutton*. 16 *Do.*, 237, *Egan vs. Threlfall*.

These points we think cover the entire case and demonstrate the correctness of the ruling of the court below in granting the plaintiff's prayers and rejecting those of the defendant; and also vindicate the propriety of the court's instruction, which is not to be regarded as a distinct and separate instruction, but must be taken in connection with the plaintiff's prayers.

ECCLESTON, J., delivered the opinion of this court.

The first proposition in the plaintiff's first prayer, relied upon as furnishing evidence, in connection with other matters, to justify the inference, that the bill of sale alluded to was made to hinder and delay creditors, and therefore void, is simply, that when Gotlieb Dietus executed the instrument he was indebted to *several persons*, who remained unpaid up to the time of trial. There is no question submitted to the jury as to the amount of his indebtedness or the extent of his means, nothing as to whether he was in embarrassed or insolvent circumstances further than what might be conjectured from the fact of his having several creditors whose claims were not subsequently paid. The language of the instruction would have been complied with if the jury had believed Gotlieb Dietus' creditors were three in number, to each of whom he owed five dollars, whilst he was worth forty thousand dollars. A prayer containing a proposition so well calculated to mislead a jury should not have been granted.

The second prayer on behalf of the plaintiff presents, not only the facts, but also the inference to be drawn from them, as set forth in the first; and if that is erroneous this likewise must be so.

Before expressing an opinion in reference to the plaintiff's

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third prayer it is proper to notice some of the principles relating to the subject of conversion, for the action of trover cannot be maintained without a conversion. It may be either direct or constructive, and therefore may be proved directly or by inference. When the plaintiff fails in proving an actual conversion it will be necessary for him to give evidence of a *demand and refusal* having been made at a time when the defendant had the power to give up the goods. A demand and refusal are only evidence of a prior conversion, which may be explained and rebutted by evidence to the contrary. 2 *Greenl. on Ev., secs.* 642, 644. *Edwards vs. Hooper*, 11 *Mees. & Wels.*, 363.

In *Nixon vs. Jenkins*, 2 *H. Bl. Rep.*, 135, goods were sold to the defendant by a party in contemplation of insolvency, and with a design of defeating the claims of his creditors. He committed an act of bankruptcy shortly after the sale, and an action of trover was instituted by his assignees to recover the value of the goods, in which they gave no proof of a demand and refusal. On behalf of the plaintiff it was insisted, that because the sale was fraudulent no demand and refusal need be proved, that being only necessary where the possession was originally lawful, and then the possession was wrongful.

But it was held by the court, "That a demand and refusal were necessary to maintain the action. When the sale was made the parties were competent to contract; there was no unlawful taking of the goods, though the transaction was liable to be impeached by the assignees. They might either affirm or disaffirm the contract, and if they thought proper to disaffirm it they ought to have demanded the goods, a refusal to deliver which would have been evidence of a conversion." And in *Browne on Actions at Law*, 440; the author says, "If a trader, in contemplation of bankruptcy, make a collusive sale or fraudulent preference, the assignees cannot maintain trover without a demand and refusal." In support of which position he refers to 2 *H. Bl. Rep.*, 135; 9 *B. & C.*, 764; and 4 *M. & R.*, 547. See also *Stewart vs. Spedden*, 5 *Md. R.*, 449, as to when a demand is necessary.

Although the principle stated by Brown, and recognized in

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the authorities cited by him be true, yet if a vendee, under such a sale, disposes of the property by sale or otherwise, after his vendor has made application for the benefit of the insolvent laws, or if prior to the application, whilst the goods were remaining in the possession of the original vendor, he may have made a second sale of them, and subsequently to the petition the first vendee adopts or sanctions that sale, such conduct will amount to a conversion without a demand and refusal, so far as relates to the sale of the goods so adopted or sanctioned. The authorities referred to by the appellee's counsel show this view of the subject to be correct. And surely it would not be promoting the ends of justice to hold, that without a demand and refusal the trustee of an insolvent could not maintain an action of trover against the first vendee under such circumstances, because a demand aud refusal, after he had parted with all authority and control over the property, would not make him responsible in trover, as he would have no power to comply with the demand when made.

The third prayer asked the court to instruct the jury, if they should find that when the suit was instituted the plaintiff had been appointed permanent trustee of Gotlieb Dietus, and had given bond as such; and if they should also find, that the bill of sale given in evidence was not made upon the consideration therein stated, and was not made *bona fide*, that then the said bill of sale was clearly and utterly void, and the plaintiff was entitled to recover what the jury might find to be the value of the property therein mentioned. If we are to consider this prayer as having any reference whatever to the subject of conversion, it must rest exclusively upon the hypothesis, that the bill of sale was fraudulent and void, and that the simple execution of it operated as a sufficient conversion to sustain the suit; without requiring that the jury should find anything in reference to the possession of the goods, whether they had been resold or in any way disposed of, or whether there had been a demand and refusal. The bill of sale was made before the grantor filed his petition as an insolvent, and even admitting it was fraudulent, and the jury might have believed it to be so, still that alone, unsupported by any other fact in regard

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to an actual conversion, or to a demand and refusal, would not justify a verdict in trover in favor of the plaintiff. The prayer was therefore erroneous.

The first prayer of the defendant was properly refused. The proposition contained in it is, that the plaintiff was not entitled to recover unless the jury believed the bill of sale had been made by the grantor with a view or intent of taking the benefit of the insolvent laws; and unless they should likewise believe the defendant had actual notice that the grantor was insolvent at the time of executing the bill of sale, and of the intention of the grantor to apply for the benefit of the insolvent laws. This was erroneous, because it did not follow that if the bill of sale was not void under our insolvent laws it might not be successfully assailed under the statute of Elizabeth, in the opinion and belief of the jury.

Our reasons for thinking the court did right in refusing the defendant's third prayer will be found sufficient, we think, to show there was no error in not granting his second prayer.

The position taken in the defendant's third prayer is, that if the jury believed the defendant's possession of the chattels in question, at any time prior to Gotlieb Dietus' application for the benefit of the insolvent laws, was with the consent of Gotlieb Dietus; and should also believe that such possession ceased by the act and choice of Gotlieb prior to his application as an insolvent, and that at the time of the plaintiff's alleged demand of the chattels the defendant had not possession of them, the verdict should then be for the defendant.

Although the jury might have believed all the matters to be true which were submitted for their consideration; and although the defendant's possession may have ceased by the act and choice of Gotlieb prior to his petition; nevertheless if the jury believed the bill of sale was fraudulent, and that after the petition the sale and delivery of possession made prior thereto by Gotlieb were adopted or sanctioned by the defendant, such acts amounted to a conversion, which rendered a demand and refusal unnecessary. In reference to the circumstances just mentioned, which, if believed by the jury to be true, would constitute a conversion, there is some evidence, but it is not

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our province to say whether the evidence is or is not sufficient to prove them.

Admitting the truth of all the circumstances presented in the prayer, on which the defendant based his right to a verdict, still there is evidence tending to prove other circumstances, which if found by the jury would entitle the plaintiff to a verdict. The prayer was therefore properly refused by the court.

The defendant's fourth prayer was erroneous for the reasons assigned in regard to the third.

In his fifth prayer the defendant asked an instruction to the jury, that the plaintiff was not entitled to recover unless they believed that the defendant had possession of or exercised control over the goods at some time since the tenth day of February 1851. In support of the position here taken, the defendant says, the plaintiff avers in his declaration, that the property in the goods was in Gotlieb Dietus on the 11th of February 1851, when the defendant converted them to his own use, and this he assumes must be proved, because a prior conversion is not sufficient. As to the averment in the *nar*, in regard to the date of the conversion, he is mistaken; the allegation being that the defendant converted the goods on the 26th day of June 1851; but if he were correct in his facts still his prayer would not be so. The *particular day* named in a *nar*, either in reference to the possession of the party whose goods have been converted, or in relation to the conversion, is not material, as may be seen by reference to two forms of *nars*, in trover, by assignees of bankrupts, to be found in 1 *Saund. Pl. & Evi.*, 205, 206.

The defendant's counsel relied with much confidence upon the case of *Edwards vs. Hooper* as sustaining their views; but that decision did not turn upon the materiality of any *particular day* named in the *nar*. The statement of the assignees' right of property instead of merely stating their right of action rendered it necessary to prove that the conversion was after the plaintiffs became assignees. But there was no discussion, either by counsel or judges, as to the materiality of the precise days stated in the *nar*. This decision does not contradict what

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is said by Saunders, nor do the other cases cited on the subject.

The statement in the *nar*, that on the 11th of February 1851, Gotlieb had possession of the goods, and on the same day they came to the possession of the defendant, by finding, we consider immaterial averments in regard to time, and that the court were right in refusing to grant the fifth prayer of the defendant.

According to the record it appears the plaintiff offered three prayers, which were all granted; then the defendant submitted five prayers, which were all refused. The language of the record at this point, (after having set forth the prayers,) is, "And the court rejected all the said prayers of the said defendant, and instructed the jury, that the sole question for them was, as to the validity of the bill of sale from Gotlieb Dietus to the defendant; that if they should find the said bill of sale not to have been made *bona fide* the plaintiff was entitled to recover what they should find to be the value of the property, but if they should find that the bill of sale was made in good faith their verdict should be for the defendant." This instruction, as also the granting of the plaintiff's prayers, and the rejection of those of the defendant, were all excepted to by him.

Notwithstanding what had previously taken place the jury might well have been misled, when informed voluntarily by the court, in very explicit terms, that the *sole question* for them was, as to the validity of the bill of sale, with direction to find a verdict for the plaintiff, if they believed that instrument to have been fraudulent, but if made in good faith then their verdict should be in favor of the defendant. From this the jury might very readily have supposed it was their duty to decide in favor of the plaintiff if they believed the bill of sale was fraudulent, without making any enquiry in regard to a demand and refusal, or to an actual conversion at any time. Taking this view of the instruction we must consider it erroneous, after what has been said on the subject of conversion in reference to the plaintiff's third prayer.

But the appellee's counsel say this direction to the jury is not to be considered as standing by itself; on the contrary it

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must be looked at in connection with the plaintiff's prayers previously granted. Admitting this to be so, still the instruction will receive but little aid from such connection, inasmuch as we have decided that each of the plaintiff's prayers is erroneous.

We affirm on the defendant's prayers but reverse on those of the plaintiff, and also on the last instruction given by the court.

Judgment reversed and procedendo ordered.

THOMAS Y. CANBY *vs.* GEORGE A. FRICK.

A prayer that the jury, in estimating the sum to be allowed the plaintiff for his services, "*should be guided by the custom in such like cases,*" is defective, because it *assumes* the existence of such custom.

A judgment will not be reversed because of a failure to grant a prayer which ought to have been granted, when all the advantage the appellant could have derived from such prayer was given him in a prayer granted at the instance of the appellee.

A party who is neither a land broker nor had been employed by the defendant, has no right of action for services rendered in the sale of the defendant's land.

APPEAL from the Court of Common Pleas for Baltimore city.

Assumpsit by the appellee against the appellant, to recover for services rendered by the plaintiff to the defendant in the sale of a farm. Plea, *non assumpsit*.

1*st Exception.* The testimony and the prayer of the plaintiff, to the granting of which the defendant excepted, are fully stated in the opinion of this court.

2*nd Exception.* This was taken by the defendant to the refusal of the court (MARSHALL, J.,) to grant an instruction, that there is no evidence of any contract between the plaintiff and defendant, and the former is, therefore, not entitled to recover.

3*rd Exception.* The defendant asked an instruction, that if the jury believe the plaintiff was not a land-broker at the time

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of the occurrences given in evidence, and that defendant did not employ the plaintiff in the sale to Evans, then the plaintiff is not entitled to recover; which the court refused to grant, and the defendant excepted and appealed.

The cause was argued before LE GRAND, C. J., TUCK and MASON, J.

Wm. A. Talbott for the appellant, argued:

1st. That there was no evidence from which the jury could infer that the plaintiff was employed by the defendant to find a purchaser for the land in question. The evidence shows that the plaintiff's whole action was at the request of and for the purchaser.

2nd. That the introduction of a purchaser to the defendant, unless at his request or by his authority, did not entitle the plaintiff to compensation, and *no implied assumpsit was created thereby*. 3 *Md. Rep.*, 201, *Beale vs. Creswell.*

3rd. That no custom was sufficiently proved which entitled the plaintiff to recover, the proof showing that the plaintiff not being a land-broker, did not come within the alleged custom, and if proved it is not a reasonable custom which this court will sustain. 6 *Md. Rep.*, 47, *Foley & Woodside, vs. Mason & Son.*

4th. That the court erred in the instruction granted, because it *assumes* that a custom had been proved and does not leave the fact to be found by the jury. 6 *G. & J.*, 70, *Crawford vs. Berry.* 3 *Md. Rep.*, 161, *Gaither vs. Martin. Ibid.*, 294, *Lewis vs. Kramer.* 4 *Do.*, 242, *Balto. & Susq. R. R. Co. vs. Woodruff.* 7 *Do.*, 300, *Balto. & Ohio R. R. Co. vs. Resley.*

5th. That there was no evidence from which the jury could infer a contract between plaintiff and defendant, and the defendant's first prayer should have been granted.

6th. The defendant's second prayer should have been granted, because the plaintiff could only recover, either from having been employed by the defendant in the sale or under the custom applying to land-brokers.

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Wm. Shepard Bryan for the appellee.

The prayer of the plaintiff embodies a clear legal proposition. Let us examine its different parts. The first section is, in effect, that if defendant employed the plaintiff to find a purchaser for the land, and the plaintiff found a purchaser, he is entitled to recover. For if the plaintiff introduced a person to whom, in consequence of that introduction, the defendant was enabled to dispose of the land, and did dispose of it, he introduced a purchaser. Can any argument assert that introducing a purchaser is not finding a purchaser? We refer to 34 *Eng. C. L. Rep.*, 267, *Wilkinson vs. Martin*. 32 *Do.*, 641, *Murray vs. Currie*. The next portion of the prayer is, in effect, that if no sum was agreed upon, (or, which is the same thing, if no sum was proved,) the jury must allow a reasonable sum. This is very clear. Then "in estimating this sum, they should be guided by the custom in such like cases." That is, they should be guided by what was usually paid—by the market price, so to speak. The customary price—the usual price—the market price—the price established by usage or custom in such cases, are equivalent expressions. The court do not instruct the jury as to the existence of any custom, nor could the jury have so understood it. The evidence applicable to this portion of the instruction was, that the "*usual charge*" was so much. Most clearly, the instruction leaves it to the jury to find from the evidence what this customary or usual charge was, or custom or usage about charging, in whatever way the idea may be expressed. Just as much so as if it said, "they should be guided by whatsoever they shall find the usual charge to be." The court do not even tell the jury they should give the usual sum, but merely, in estimating what a reasonable sum amounts to, they should be guided by what is customarily paid. This was something to assist them in their investigation.

If the prayer then was correct as a legal proposition, the next question is, whether there was evidence to support it. And certainly there was. Evans says, "defendant said he did not know what amount plaintiff was going to charge him, and desired witness to see Frick and get him to make the charge light," &c. And on cross-examination says, "he would swear

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that Canby agreed to pay plaintiff's commissions." It cannot be seriously denied, that this was evidence to be submitted to the jury of a contract between the parties, even if there were no other. If the above views be correct, the defendant's first prayer was properly rejected.

In the second prayer of the defendant, the jury are directed to make two inquiries:—First, whether the plaintiff was a land-broker. Secondly, whether he had been employed by the defendant. The first of these inquiries was totally irrelevant. It could make no possible difference whether the plaintiff was a land-broker or not. There is nothing in the law to prevent persons other than land-brokers from making contracts of this kind. The second inquiry proposed had been already submitted to the jury by the plaintiff's prayer. The court, therefore, properly rejected it. But this is not the only objection to the prayer. Whatever may be the astute criticism of the learned counsel upon the language, it is clear that its obvious meaning is that it was incumbent on the plaintiff to prove:—First, that he was a land-broker. Secondly, that he made a contract with defendant. If this were not the intention in drawing the instruction, it is difficult to see why the clause about the land-broker was inserted. It surely cannot be supposed that the jury were obliged to consider a question which was to have no bearing on their verdict. No ingenuity can make it appear that it was not the design of the prayer that the jury should regard the two questions contained in it as decisive of the cause.

Le Grand, C. J., delivered the opinion of this court.

This action was instituted to recover for services rendered by the appellee to the appellant in the sale of a farm. It was proved by Mr. Evans, that in the year 1852, he purchased of appellant a farm for the sum of $10,000. The appellee took the witness to appellant to introduce him, a week or ten days before the purchase was consummated. In the early part of the negotiation, the appellant made it a part of his agreement, that the witness should pay to the appellee his commissions. This was not assented to, and the appellant "*agreed to pay plaintiff's* (appellee's) *commissions.*"

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It was proved by Thomas J. Gott that he is a land-broker, and that the usual charge by such brokers for making sales is a commission of two per cent.; some charge two and-a-half, or get it where it is offered; and also, that there is a custom in Baltimore, that if a broker takes a purchaser to a seller and introduces him, he is entitled to his commission from the seller when the sale is made: this custom extends to a class of persons whose business is buying and selling land, and known in Baltimore as land-brokers. The appellee is not a land-broker, but a clerk in the office of the Baltimore Cemetery Company.

The only testimony offered on behalf of the appellant was, that on a certain day, appellee called at his counting-room and inquired if he had a farm to sell, and if so, what he asked for it. The appellant replied he had, and would take for it $20 per acre for five hundred and forty acres; appellee then said, he knew a gentleman who wanted it.

On this state of case, the appellee asked the following instruction, which was granted by the court:

"That if the jury shall believe that the plaintiff was employed by the defendant to find a purchaser for a tract of land called Bailey farm, belonging to the defendant, and that the plaintiff did introduce to the defendant a person who, in consequence of that introduction, the defendant was enabled to dispose of said tract of land, and did dispose of it, that then the plaintiff is entitled to recover. And that if the jury cannot ascertain from the evidence the amount of compensation agreed to be paid to the plaintiff by the defendant, they should allow him a reasonable sum for his services, and in estimating this sum, they should be guided by the custom in such like cases."

Two objections are urged to this prayer:—*first*, that there is no evidence from which the jury could infer the plaintiff was employed by the defendant; and *second*, that the prayer took away from the jury the finding of the custom, in such like cases, which they were told they should be guided by; in other words, assumed the existence of a custom in like cases.

The first objection, in our opinion, is not tenable. The evidence on the part of the defendant was confined entirely to a single interview between him and the plaintiff. There may

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have been others, and the other evidence in the case was sufficient to authorise the jury so to infer. The purchaser distinctly states, that in the early part of the negotiation, the defendant insisted he should pay the commissions of plaintiff. Why this, if he did not consider himself under an obligation to pay them? Again, the same witness is equally positive the defendant distinctly "*agreed to pay plaintiff's commissions.*" Evidence could not be more unequivocal. We think the second objection well taken. The proof of custom—waiving, for the sake of the argument, all inquiry as to its sufficiency, even as to a particular class—the plaintiff was by the proof shown and conceded on all sides not to be embraced in it. The only use which could be made of it was to enable the jury to form some idea of the rate at which similar services are compensated, not, however, *because of the custom*, but as a fact tending to show that services of a particular kind were esteemed in the community of a certain value. It would not be binding on the jury, but would be a fact to which they would have the right to look in making up their judgment. The prayer in taking from the jury the finding of the fact was error, and by assuming its existence, in the absence of all other testimony on the subject of the value of similar services, was clearly defective under the decisions of this court. *Balto. & Susq. R. R. Co. vs. Woodruff*, 4 *Md. Rep.*, 242, and the cases there referred to. What we have said in regard to the prayer of the plaintiff disposes of the first prayer of the defendant. It was properly rejected. The second prayer should have been granted. For if the plaintiff was neither included within the class known as land-brokers nor had been employed by the defendant, he had no right of action. Had, however, the plaintiff's prayer been free from the defect to which we have alluded, we would not have reversed the judgment because of a failure to grant defendant's second prayer, inasmuch as the plaintiff's prayer gave him all the advantage he could have derived from his second prayer.

Judgment reversed and procedendo awarded.

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WILLIAM G. W. WHITE *vs.* ALEX. B. DAVIDSON, THOMAS HARRISON, BENJAMIN F. HARRISON, CARTER A. HALL, THOS. W. HALL and BEVERLY C. SANDERS.

The employment of an attorney to prosecute an injunction suit does not confer on him, *ex necessitate*, the right to bind his clients to indemnify a third party who becomes surety on the injunction bond.

An attorney *as such* may submit a cause to arbitration, and if he makes a compromise *bona fide* which works no considerable hardship the courts will be slow to disturb it, and will refuse when it has been acquiesced in with full knowledge of the facts.

Where an agency created and defined by a written instrument is delegated to *three* it cannot be executed by *one*, and the agents cannot delegate their authority to another.

Where a party without authority assumes to act as agent for others, the latter are not bound, unless on full knowledge they recognised and adopted his acts.

The issuing of an injunction does not necessarily require a bond, for that is a matter resting in the discretion of the judge who is to order it.

If a partner without authority therefor, agrees to indemnify a surety on an injunction bond in a suit prosecuted for the benefit of the firm of which he is a member, his act does not bind the firm unless his co-partners subsequently acquiesced therein.

APPEAL from the Superior Court of Baltimore city.

Assumpsit by the appellant against the appellees. The *nar* contains the usual money and *insimul computassent* counts. Plea, *non assumpsit*. A bill of particulars was furnished on demand, stating that plaintiff's claim is founded on a *written* promise to indemnify him if he would become security of Henry Carter in an injunction bond to James M. Carlisle and others, dated the 22nd of June 1846, made to plaintiff by Joseph H. Bradley, the solicitor and agent of defendants, and by authority of defendants to Bradley, and is accompanied by particular items of costs, and amounts paid Carlisle by plaintiff on account of a judgment recovered against him on this bond, amounting to $3726.32.

1*st Exception*. The facts of the case as proved in evidence

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are sufficiently stated in the opinion of this court. The plaintiff then offered six prayers, in substance as follows:

1st. If the jury find that defendants, or their respective firms, were creditors of Carter and Washington, and they, or any member of their respective firms, were privy to the employment of Bradley as counsel to secure their claims, and that Bradley so employed, advised the filing, and did file the bill of injunction in the name of Henry Carter, with the privity and consent of defendants, and that to obtain the requisite security upon the injunction bond in that suit, Bradley, as such counsel, prevailed upon plaintiff to become such security, upon the assurance that the creditors whom he represented as counsel would indemnify him, then such assurance so made by Bradley to plaintiff is legally binding on defendants,—*(rejected.)*

2nd. If the jury find that Sanders and Hall, or either of them, were the agents of defendants, and that they authorised Sanders to employ Bradley to obtain the injunction mentioned, and that Bradley, with the approbation of Sanders, acting for these creditors, drew up a paper assuring plaintiff that he would be indemnified for going on the injunction bond, and that in consideration of this he did become security on the bond, then defendants are bound by the acts and promises of their agent and attorney, Bradley,—*(granted.)*

3rd. If the jury find that Sanders, assuming to act for the Baltimore creditors of Carter and Washington, employed Bradley as their counsel to file an injunction bill in the name of, and by arrangement with, Henry Carter, for their benefit, and also to settle with one Patterson his claim under a deed of trust as stated in evidence, and that Sanders did, at the time of so employing Bradley, authorise him to write the letter to plaintiff, requesting him to become security on the injunction bond, and in consequence thereof plaintiff did become such security, then he is entitled to indemnity against the defendants, *provided* the jury further find that defendants, or any member of their respective firms, did, subsequently, and with a knowledge of such employment, contribute their respective proportions of Bradley's fee in the premises, and their proportion towards the settlement of Patterson's claim accord-

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ing to said arrangment made through Sanders, and with a knowledge that the same was effected by him, and it is no defence in this case that defendants had not previously authorised Sanders, or were not aware of the agreement made by Bradley with plaintiff under the sanction of Sanders, *(rejected.)*

4th. (This prayer was abandoned by the appellant in this court, and therefore need not be stated.)

5th. If the jury find that defendants were creditors of Carter and Washington, and desired to secure their claims by legal proceedings to annul the deed of trust to Carlisle, and that Sanders, assuming to have full power from them to act in the premises as their agent, went to Washington, and, under the advice of Bradley as counsel, made an arrangement with Henry Carter, by which Sanders caused an injunction bill to be filed with a view to benefit defendants, and, with a view to obtain the necessary security on the bond required in that suit, was privy and consented to the writing of Bradley's letter to plaintiff, and that in consequence thereof and the promise of indemnity therein plaintiff became such security, and that at the time of so acting Sanders and Davidson, trading as Davidson and Sanders, were creditors of Carter and Washington, then both Sanders and Davidson are liable to indemnify plaintiff against loss as such surety in this suit, if the jury find a joint liability to plaintiff between them and their co-defendants. And if the jury further find that at the time of his procuring Bradley to file said bill, Sanders promised that the creditors would pay him a fee, and further arranged through Bradley that defendants would retire a note in bank by the substitution of another note, which they would pay as part and parcel of the arrangement made by Sanders to secure their claims, and upon his return to Baltimore Sanders reported to his co-defendants that he had employed Bradley as counsel for them, and that Bradley had filed the bill and obtained the injunction for their benefit, and for so doing, as well as his future management of the suit, they were to contribute to his fees, and that Henry Carter was to be released by them from all liability for the debts of Carter and Washington to them,

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but that said Carter had furnished the security on the injunction bond; and further reported said arrangement in reference to the note, then his co-defendants had notice from that time that Sanders had assumed to act in the premises as their agent upon his own judgment and discretion, and especially in reference to the institution of the suit and employment of counsel. And if the jury further find that, with full knowledge of the representations of Sanders so made to them, defendants agreed to, and did, recognise his said agency in their behalf, and for that purpose did perform what he had undertaken they should perform in respect to the counsel fees and note, and then and there agreed and consented that Sanders should continue to act as their agent in respect to the future management of said suit, and that Sanders, with their consent and privity, afterwards wrote the letters to Bradley read in evidence, and continued to act and was recognised by them as their agent until the dissolution of said injunction, then from the time of their so continuing Sanders as their agent, his co-defendants are chargeable with all notice which Sanders had of the promise of indemnity contained in Bradley's letter; and if the jury further find that Sanders had at the time of being so continued as agent, and recently before then, by his previous acts, authorised Bradley to write said letter, which Sanders fully recollected, then it is not competent for his co-defendants to repudiate their liability on their promise of indemnity in that letter, if the jury find that before the termination of Sanders' agency, and after his continuance therein, by consent of his co-defendants, there was sufficient and reasonable opportunity for them to have notified plaintiff that they repudiated the promise of indemnity to him, and that they failed so to do,— *(rejected.)*

6th. If the jury find all the facts stated in the preceding prayer they ought to find therefrom, that his co-defendants have, with full knowledge of the material facts connected with Sanders' agency in their behalf, agreed to ratify and adopt his agency in the premises; and if they find that his co-defendants so ratified his agency in part with such knowledge and the further knowledge, that he had been acting as their agent

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upon his own judgment and discretion, then they are responsible for his contracts and undertakings at the time of transacting them within the scope of said agency, notwithstanding at the time of such partial ratification they may have relied on his erroneous statements in respect to some of the terms of the arrangement so made by him in their behalf,—*(rejected.)*

The defendant then offered prayers in substance as follows:

1st. If the jury believe there was an arrangement between Carter and defendants in regard to legal proceedings to be instituted by Carter to set aside a deed of trust made by his former partner, and that the terms of this agreement were, that Carter should file an injunction bill and furnish the security upon the injunction bond, upon condition that defendants should release him from their claims against him as creditors, and that after this agreement the plaintiff became surety in the bond without any further agreement between defendants and him or Carter, the plaintiff is not entitled to recover,—*(granted with consent of plaintiff.)*

2nd. That under the bill of particulars filed in this case the plaintiff can only recover upon the promise in writing referred to therein,—*(granted with consent of plaintiff.)*

3rd. That the plaintiff cannot recover unless the jury find the letter to him, set up as the foundation of this suit, was duly authorised by all the defendants, or subsequently ratified by them after notice of the same, or was authorised by some and ratified by the rest after notice,—*(granted.)*

4th. That the mere relation of counsel or attorney without any special authority, gave Bradley no power to write this letter so as to bind defendants or any of them to any contract of indemnity contained in it,—*(granted.)*

5th. That this letter is insufficient in law to bind the defendants, and therefore the plaintiff cannot recover,—*(rejected.)*

6th. If the jury find that plaintiff became the surety of Carter in the bond referred to, and on the 2nd of February 1854, executed and filed in this case a release to Carter from all liability or responsibility to him by reason of such suretyship, then the plaintiff is not entitled to recover,—*(rejected.)*

To the several rulings of the court, (FRICK, J,) as indicated in this exception adverse to him, each party excepted.

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2nd Exception.—The defendants objected to the admissibility in evidence of what passed at the interviews between Bradley and Sanders and Hall, and to the competency of Bradley to testify in relation thereto, and to the letters to him from Sanders, upon the ground that what passed at such interviews and said letters, were privileged communications between client and attorney; and also to the competency of Bradley, upon the ground that he was interested in the event of this suit, all which objections the court overruled and defendants excepted.

3rd Exception.—The plaintiff offered in evidence a copy of the injunction bond referred to, attested by a certificate of the clerk of the circuit court of the District of Columbia, under the seal of said court, "that the annexed is a true copy of the original bond filed in the case of *Henry Carter vs. James M. Carlisle, et al.*" The attestation of the clerk was also certified to by the chief judge of said court. The defendants objected to this copy being read in evidence upon the ground that the same appeared to be a part of a record, and that part of a record, however authenticated, should not be permitted to be read in evidence; and also that said copy was not legally certified or authenticated. These objections the court overruled and defendants excepted.

The verdict and judgment were in favor of the defendants and the plaintiff appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

Robert J. Brent for the appellant, argued:

1st. The plaintiff's first prayer was erroneously rejected. Bradley was unquestionably the counsel of these defendants in the injunction suit. They all contributed *pro rata* to the payment of his retaining fee, and in all respects and at all times followed his advice as such counsel, to promote the purposes of that suit. The paper of the 19th of June 1846, signed by the firms comprising all these defendants, clearly shows, that they had all placed their claims under his legal advice and control,

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and he was to exercise plenary judgment and discretion, whether the proceedings should be in the name of the creditors or of Carter. In pursuance of this authority he states that he filed the bill in the name of Carter, and as a necessary means to that end, promised indemnity to the security on the injunction bond, and at the time he did so Sanders was privy and assenting for those who were acting with him in the common purpose of prosecuting under his advice and through his professional agency their affiliated and associated rights as creditors. He also proves, that Thomas W. Hall authorised him to procure security for Carter's bond and to promise indemnity in behalf of the creditors. Thomas W. Hall was a member of the firm consisting of the two Harrisons and himself, and as this agreement was with a view to the recovery of a claim due to that firm, we hold, upon the implied authority of each partner, to bind the firm to this agreement, irrespective of all other considerations, that it is conclusive upon these three defendants. One partner can release a debt. 4 *G. & J.*, 310, *Smith vs. Stone*. He can bind the firm by any act in relation to their partnership claim. 7 *H. & J.*, 28, *Coursey vs. Baker*. *Ibid*, 213, *Barger vs. Collins*. 2 *Pick.*, 285, *Marsh vs. Gold*. If one partner, within the scope of the partnership authority, commits a fraud, it is equally in law the fraud of all the partners. 1 *Parsons on Cont.*, 62. For the like reason the agreement of Sanders binds his co-partner, Davidson. Here then are five defendants, all of whom, either personally or by their co-partners, expresely authorised Bradley to make this contract of indemnity. The other defendant, Carter A. Hall, was one of the committee on behalf of the creditors, but states that he did not take an active part therein, and denies that he assented to any agreement about the security. But he and all the defendants concede, that Bradley was their counsel, feed by them, as such filed the bill for their benefit and with their privity in Carter's name. On this, and independent of any express authority, we contend, that as a means to the common aim and object of the defendants their counsel had a right to procure the requisite sureties in the injunction bond, and for that purpose to bind them to indemnity, and this

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whether they knew it or not. 2 *Greenlf. on Ev., sec.* 141. 2 *McCord's Ch. Rep.*, 409, *Smith vs. Bossard.* 1 *Pick.*, 462, *Adams vs. Robinson.* 3 *Md. Ch. Dec.*, 395, *Kent vs. Ricards.* 7 *Cranch*, 436, *Holker vs. Parker.* 1 *Dallas*, 164, *Somers vs. Balabrega.* 1 *Overton*, 299, *Blount vs. Foster.* 8 *Shepley*, 558, *Rice vs. Wilkins.* 1 *Am. Com. Law Cases*, 4. 17 *Ohio*, 460.

Where there is a community of design, and the combined action of many for the attainment of a specific object, the rule of law makes all responsible for the action of any one of the confederates in furtherance of the general purpose of all, and upon this principle alone the authority given by Sanders and Hall, or either of them, to Bradley, the selected counsel of the defendants, is to be considered as the authority of all, especially when it is seen that the injunction in the name of Carter, which was sought for, could not be obtained without security on the bond of Carter. 1 *Greenlf. on Ev., sec.* 174, *note* 3. 2 *Starkie on Ev.*, 29, 31, 205. 9 *Eng. C. L. Rep.*, 414, *Perham vs. Raynal.* 5 *G. & J.*, 144, *Owings & Piet vs. Low.* In such case the declarations of one are the declarations of all acting with him. 2 *Barn. & Ald.*, 673, *Sandilands vs. Marsh.* 1 *Starkie's Rep.*, 81, *Nicholls vs. Dowding.* If plaintiff pays money for a debtor to his creditor upon an agreement to indemnify plaintiff by mortgage and to assign judgments, the plaintiff is an agent and may recover the money paid. 12 *G. & J.*, 36, *Hall vs. Creswell.* If C becomes bail for a debtor at the request of B, and on B's promise to indemnify him, B is liable, on his parol promise, which is original. 1 *Pet.*, 476, *De Wolf vs. Rabaud.* 2 *Do.*, 170, *Townsley vs. Sumrall.* 12 *Mass.*, 297, *Perley vs. Spring.* 17 *Johns.*, 114, *Chase vs. Day.* If a guarantor promises, before delivery, absolutely to pay, the *statute of frauds* does not apply. 2 *Saund. on Pl. & Ev.*, 54. 1 *Esp.*, 121, *Croft vs. Smallwood.* 2 *Ld. Raym.*, 1087, *Buckmyr vs. Darnall*, also reported in 1 *Salk.*, 27. And it seems, that if before delivery defendant verbally promises absolutely to pay, he is liable, though the party for whom he promises may be also liable. *Manuscript case of Wolfolk vs. Baltzell* in the *Court*

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of Appeals in 1839, 1 *Gill*, 260, *Conolly vs. Kettlewell*. The distinction is whether the promise is to pay absolutely or only secondarily on default. It is always for the jury to whom the credit is given. 2 *Saund. on Pl. & Ev.*, 547. Wherever the promise is not within the statute *indebitatus assumpsit* lies. 7 *H. & J.*, 392, *Elder vs. Warfield*. There is in this case a sufficient consideration for the promise of indemnity. 1 *Saund. Pl. & Ev.*, 179. But here we have a written indemnity in behalf of the creditors, signed by Bradley, their agent, and his authority may be proved by parol. 2 *Saund. Pl. & Ev.*, 551.

2nd. The next question arises on the refusal of the court to grant the plaintiff's third prayer. This prayer is designed to maintain the legal sufficiency of the evidence, if believed, to show the liability of the defendants for the authority given by Sanders to Bradley, and under which he made the contract of indemnity to the plaintiff. If the three defendants constituting the committee named in the agreement of June 1846, instead of Sanders, had authorised Bradley to give this indemnity to White, and had not disclosed their written authority and the terms of it to White, there can be no doubt that the principals for whom they acted would be bound on the indemnity promised, because they had authorised the committee to indemnify the surety of Carter under the advice of Bradley, and for so doing had promised indemnity to the committee. Even a special agent to do a thing may bind his principal at the time by a warranty or promise of imdemnity, if not expressly *forbid to do so*, upon the principle, that every thing is supposed to be comprehended in the authority which is necessary to effectuate the object in the best manner. *Paley on Agency*, 210. 1 *Parsons on Cont.*, 50, 51. But this written authority, so far from denying to the agents the power to promise indemnity in behalf of their principals to the surety of Carter, expressly promises them indemnity if they personally incur responsibility to such surety. It contains the strongest implied authority to contract directly for the principals, and incur primarily for them a liability which they agreed indirectly to assume. But we draw a still stronger inference from

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this paper. It is subscribed by the three firms of which the six defendants were members, and the three agents named in it are three of these defendants; these agents are, therefore, both principals and agents in that paper. We show, therefore, by this paper as against all these defendants, that they and their firms contemplated giving indemnity to the sureties of Carter, and that they were willing themselves to authorise the very thing to be done which was done by the advice and procurement of their counsel and with the privity of Sanders, acting as a substitute for the original committee of three. In such a case, very slight evidence of the authorised substitution of Sanders to act in place of the three original agents who failed to act conjointly, would be sufficient; and we insist, that if such substitution is proved, that the substitute is to be taken, *prima facie*, to have all the powers conferred upon the three for whom he is substituted. So far as Carter A. Hall is involved, we have his explicit admission that he recognised Sanders, and ratified his arrangement with Carter upon the representation made by Sanders that Carter was to furnish the security. He also admits that he declined to act on the committee, and acquiesced in the acting of Thomas W. Hall and Davidson. It would be to sanction a constructive fraud now to allow, after such acts of acquiescence and laches, and after his direct sanction of the agency of both Thomas W. Hall and Sanders, and of Bradley, the counsel for the creditors, to turn round and repudiate the solemn contract made by his own counsel, with the privity of both Hall and Sanders; and this especially after he had, as a creditor, taken all the benefit he could by the injunction suit, based on the bond signed by the appellant, which suit he knew was brought, and which he sanctioned by paying his proportion of Bradley's fee and of the note given to retire the prior lien of Patterson, as arranged by Bradley and Sanders. After such acts, shall it be tolerated in morals for him, at this late day, to repudiate the contracts made in his behalf because not informed or falsely informed by his own agent of a particular stipulation? But independently of an express indemnity, we contend, that upon all these facts, if White was told the suit was for the benefit of the creditors

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and that Carter was to be released, as shown on the face of the written indemnity, then he would have a right to recover on an implied *assumpsit* as against all these creditors, upon the principle, that he was in fact their security and went on the bond at their request and for their benefit, and that on such a state of facts the law would not, in the absence of a special contract, imply a right to recover against Carter, the nominal principal in the bond. It was, in effect, their suit, prosecuted by their counsel and for their benefit, and upon their agreement to release Carter in consideration of the use of his name as nominal complainant. 2 *Pet.*, 613, *Chirac vs. Reinecker.*

This prayer rests also on the distinct principle, that the subsequent ratification of the act of Sanders in employing Bradley as counsel to obtain this suit, by contributing money through Sanders towards the fee of Bradley and the Patterson claim, with full knowledge of Sanders having so claimed to act for them, and of all the material acts done by him, is equivalent to a previous authority, and that it is no defence to show that they were, at the time of such ratification, unaware of the agreement made by Bradley with the plaintiff, under the sanction of Sanders. An agent may be constituted by ratification with knowledge of material facts, and it is equal to a *previous authority*. *Story on Agency, secs.* 133, 134, 135, 138, 139, 140, 249, 253. 28 *Law Lib.*, 74, 82, 86, 91, 111. 2 *Kent's Com.*, 616. 7 *East*, 164, *Hovil vs. Browning*. 9 *Cranch*, 161, *Clark vs. Van Riemsdyk*. Sanders and Bradley were both continued as agents after the co-defendants were informed and ratified what was told them, and nobody else transacted the business but Sanders. Under this sanction of his acts and the continuing authority to superintend the suit, notice of this contract of indemnity to Bradley and Sanders is notice to their principals from the time they constituted them their agents, and they cannot deny such notice any more than their agents could. *Ambler*, 439, *Le Neve vs. Le Neve*. 2 *Strange*, 1183; *Scrimshire vs. Alderton*. 1 *Esp.*, 290, *Cowen vs. Simpson*. 2 *Eq. Cases Abr.*, 685. 3 *Merivale*, 210, *Toulmin vs. Steere*. 1 *Term Rep.*, 12, *Fitzherbert vs. Mather*. 4 *Do.*, 66, *Willis vs. Martin*. 1 *Ves., Sen.*, 62, *Maddox vs. Maddox*. 13 *Ves.*,

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121, *Hiern vs. Mill.* There is no difference between actual and constructive notice in such a case. *Ambler*, 626, *Sheldon vs. Drummond.*

3rd. The *fifth* prayer of the appellant ought to have been granted, as in its first part it simply establishes a joint liability between the two co-partners, Davidson and Sanders, for the acts of Sanders in respect to their partnership claim, and then proceeds to charge the other defendants with constructive notice of the contract of indemnity made with the plaintiff from the time that they recognised Sanders as their agent in superintending and managing the injunction suit, and thus became bound by the previous notice fastened on their agent, Sanders. We consider that this prayer is fairly deducible from the doctrine above discussed, in relation to constructive notice to the principal, of what is known by his agent in respect to the *res gestæ* of his agency. The plaintiff's *sixth* prayer is for the same reason maintainable, and stands upon grounds equally secure, as it raises legitimate inferences from the facts stated in the *fifth* prayer. The defendants' *third* and *fourth* prayers cannot be maintained if the principles above discussed by us are approved by this court, as they virtually negative all right in the plaintiff to recover on this evidence.

4th. In regard to the appellees' exceptions, we insist there was no error in the court's rulings on these points. Their first exception was correctly decided, because Bradley was a competent witness and committed no breach of professional confidence in giving the testimony, because he was also an agent, and as such a party to the transaction, and therefore White is entitled to all the facts bearing on the question of his authority. 1 *Greenlf. on Ev., secs.* 244, 245. 8 *Car. & Pay.*, 596, *Regina vs. Avery.* 2 *Nev. & Man.*, 310, *Ripon vs. Davies.* 5 *Man. & Gr.*, 271, *Shore vs. Bedford.* 5 *Barn. & Adol.*, 502, *Griffith vs. Davies.* *Peake's Cases*, 108, *Duffin vs. Smith.* The evidence being admissible for any purpose, as to prove the retainer of counsel or the authority to make the offer of indemnity, or any part of the evidence being legally admissible, the general objection to the whole cannot be insisted on in this court. 3 *Gill*, 220, *Budd vs. Brooke.*

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Their second exception shows on its face very clearly that the attested copy of the injunction bond was read by consent of parties. And so also, we contend, the appellees' prayers were correctly refused.

Wm. A. Talbott and *Geo. Wm. Brown* for the appellees, argued:

1st. That the employment of counsel to secure the claims of the defendants against Carter and Washington, and the filing by such counsel of a bill for injunction, did not confer an authority on the counsel to bind the defendants by any assurance of indemnity to the plaintiff, and the appellant's first prayer was therefore properly rejected, inasmuch as it did not require the jury to find that the counsel gave such assurance with the privity and consent of the appellees, or any subsequent ratification by them, and the appellees' third and fourth prayers were properly granted as containing the law of the case. That an attorney, by virtue of his retainer as such, cannot bind his client to any such obligation as to indemnify a surety on an injunction bond, see 4 *Gill*, 20, *Doub vs. Barnes*. 21 *Conn.*, 245, *Derwort vs. Loomer*. 2 *Greenlf. on Ev.*, *sec.* 141. 13 *Metcalf*, 413, *Shores vs. Caswell, et al.* 15 *Verm.*, 320, *Vail vs. Jackson*. *Kyd on Awards*, 45. Bradley was an agent for a *special purpose*, and he could not bind his principals beyond the terms of his special authority, which must be strictly pursued. *Smith's Mercantile Law*, 58, 60, in 17 *Law Lib.*, 36, 37. 5 *Johns.*, 58, *Nixon vs. Hyserott*, and *note (e,)* on *page* 59. 7 *Johns.*, 393, *Gibson vs. Colt*. 5 *Hill*, 634, *Birckhead vs. Brown*. No necessity, however pressing, would authorise the agent to exceed his authority. 7 *Mees. & Wels.*, 596, *Hawtayne vs. Bourne*. But suppose he had express authority, how is it proved? The paper of the 19th of June 1846, was a joint authority to three, which could not be exercised by one or two. *Smith's Mercantile Law*, 60.

2nd. That whatever may be the appellant's remedy against Sanders, he cannot recover in this action against these appellees, even though the jury should find all the facts stated in

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his third prayer, because the co-defendants never empowered Sanders to bind them, and never had notice that he had so bound them. Their subsequent acts did not ratify his previous acts, except in so far as those acts had been communicated to them, and this prayer assumes as matter of law from the facts stated in it that Sanders' acts were recognised by his co-defendants, whereas such recognition was a question for the jury. 8 *G. & J.*, 323, *Steam Packet Co. vs. Dandridge.* 3 *Pet.*, 81, *Bell vs. Cunningham.* 9 *Do.*, 629, *Owings vs. Hull.*

3rd. That a knowledge by Sanders of all the facts stated in the appellant's fifth prayer was no notice to his co-defendants, and their subsequent recognition of his employment of counsel, and having taken legal proceedings, was in no way a recognition of his authority to bind them, because, as appears from the testimony of Hall and Davidson, he stated to them that Carter had furnished the security on the bond, and in consideration of his so doing they were to release Carter, pay counsel fees and contribute to the Patterson debt. 8 *G. & J.*, 323. 9 *Pet.*, 629.

4th. That the fifth and sixth prayers of the appellant were properly rejected, because they do not leave the jury to find that Bradley wrote the letter to the appellant on which the suit is founded, but *assume* that the letter was written and that it was received by the appellant. 6 *G. & J.*, 70, *Crawford vs. Berry.* 3 *Md. Rep.*, 294, *Lewis vs. Kramer.* 7 *Do.*, 297, *Balto. & Ohio Rail Road Co. vs. Resley.*

5th. That if the ruling of the court be erroneous, there can be no *procedendo* because of the release by the appellant to Carter. The appellees, if liable to the appellant at all, were so for the default of Carter, and had against him at law a claim for whatever sum they might be compelled to pay the appellant. Carter was equally liable to the appellant, and the release discharges him from responsibilities to appellant, and thus discharges the appellees who were his sureties to the appellant. 2 *Md. Rep.*, 286, *Scott vs. The State.* *Theobald on Principal & Surety*, 114, 115, 252, 253, in 1 *Law Lib.*, 67, 68, 150. *Burge on Suretyship*, 160, 161, 348, 352, 353.

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LE GRAND, C. J., delivered the opinion of this court.

The record in this case shows the following state of facts: A mercantile firm, under the style and name of Carter & Washington, in the city of Washington, D. C., were indebted to merchants in the city of Baltimore. Washington, by transfer, as it was alleged, had conveyed the joint assets to secure the payment of his own debts to the exclusion of those of his partner, Carter. The creditors of both, in the city of Baltimore, being desirous of having the property appropriated to the payment of the debts of the firm, appointed a committee in the following words, to superintend and guard their interests:

"We, the undersigned creditors of Carter & Washington, agree to contribute, ratably, our proportion of all expenses incurred, (agreeably to the amount of our claims,) in any legal or other proceedings which have or may be taken by A. B. Davidson, C. A. Hall and T. W. Hall, in reference to the assignment and bill of sale made by R. C. Washington, for the benefit of B. F. Gardner and Franklin Gardner; and we do hereby further agree to indemnify them against all loss for any liabilities assumed, or security given by them or by Henry Carter, of the late firm of Carter & Washington, in any further proceedings which may be taken by him or them, under the advice of their counsel, J. H. Bradley, Esq., of Washington. Given under our hands this 19th day of June 1846.

Signed, HARRISON & Co.,
DAVIDSON & SANDERS,
HALL, TAYLOR & Co.,
CAMPER & BRUFF,
MARRIOTT, MARYE & Co.,
W. H. HARRISON & Co.,
SPILKER & ALBERTI."

In pursuance of this authority Sanders and Thomas W. Hall went to Washington, assuming to act on behalf of their own firms, and as representatives of the other creditors of Carter and Washington, to advise with counsel and take measures to oppose the deed of Washington. They employed Joseph H. Bradley, Esq., as counsel, to file a bill for an injunction and to set aside the deed. Hall returned to Baltimore, leaving

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Sanders in Washington. Bradley procured the appellant to go on the injunction bond. The injunction was subsequently dissolved, suit instituted on the bond, and a judgment obtained against the appellant for upwards of three thousand dollars.

Mr. Bradley testifies that he requested the appellant, White, to go on the bond, but he positively refused to do so, unless he had some written evidence of indemnity. Bradley then informed him that both Hall and Sanders had distinctly agreed, that if such security could be got, the creditors whom they represented would indemnify the security; that on the same day, White being in the office of the witness, the latter then, in the presence and with the privity and consent of Sanders, wrote the following letter:

"Mr. W. G. W. White,

Dear Sir:—If the judge grants the injunction to-day, Mr. Carter will have to give security of course. It is very important that none of the creditors should join in the bond, for I may want to make them or some of them witnesses. I have their authority for saying, that if this thing is done they will release Carter, and indemnify any one who goes his security. The penalty in the bond will probably be two thousand dollars, or possibly $5000, but the risk cannot be any more than the loss on the postponed sale of goods, and the interest on their value and the expense of keeping them. Under these circumstances I have suggested to Mr. Carter to ask you and Dr. Gunton, as the friend of Mr. Davidson, (or some other gentleman here,) to join him in the bond."

In reply to certain interrogatories propounded to Thomas W. Hall and others on behalf of the appellant, he states in substance, that he, in company with Mr. Davidson, visited Washington city, and there endeavored to get Carter to take legal measures to have set aside the deed of Washington, and, as an inducement, promised to procure a release from his firm and that of Davidson & Sanders, of all liability for what he was indebted to them. That Sanders, who was then the partner of Davidson, went to Washington *without any appointment from the creditors of Carter & Washington constituting him their agent*, for the purpose of taking the place of his partner, the said Davidson. He also denies that any arrange-

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ment in regard to the injunction or security obtained for it was assented to by him or his colleagues, Messrs. Davidson and Carter A. Hall, other than that of which the creditors were informed by Sanders, to wit: that Carter should file the bill and find the security, provided the creditors would release him unconditionally and pay the fee of Mr. Bradley.

The answer of Carter A. Hall and that also of Alexander B. Davidson explicitly denies the authority of Sanders to bind the creditors as he sought to do, according to the testimony of Bradley.

This statement of the facts is sufficiently full to present the questions of law arising out of the case.

The theory of the appellant's case is simply this:—he claims to be indemnified for his loss because of the recovery had against him on his bond: *first*, because of a specific contract to that effect; and *second*, that the employment of Bradley, as counsel, to file a bill for an injunction necessarily carried with it authority to do all things essential to its procurement, and, if to such end, a bond was indispensable, he had the right to promise an indemnity to any one who should become security on it, which would be binding on those whom he represented.

As to the first proposition: It involves a question of fact only, to wit, the existence of the contract. Bradley states that Thomas W. Hall and Sanders authorized it; Hall on the other hand denies it. From Sanders we have no response except that which is detailed in the answers of the two Halls and Davidson. Mr. Bradley states that Thomas W. Hall, at an interview had between him, witness and Sanders, "produced a paper and said they were authorized by the creditors who signed that paper to come to Washington and employ said Bradley to enjoin the sale, which was advertised to take place." He did not, however, "read said paper or see the names signed to it." The only written authority to any one to superintend and manage the rights and interests of the Baltimore creditors, of which there is any evidence, is that bearing date the 19th day of June 1846. This must have been the one produced by Thomas W. Hall, and had Mr. Bradley examined it he would have seen it conferred no authority

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whatever on Mr. Sanders to employ counsel, or in any other manner to intermeddle with the business. Unless the parties, sought to be held liable, distinctly authorized him to act, anything he might do would not bind them, unless, on full knowledge, they recognized and adopted his act. There is no proof whatever in the record that they have adopted the act of Bradley in writing to the appellant, and promising him indemnity with the consent and privity of Sanders, as testified to by Bradley. So far from it they expressly deny Sanders ever communicated to them any such promise as that spoken of by Mr. Bradley. In this state of case if the defendants be responsible at all, it must be because the employment of Bradley, as counsel, conferred on him, as such, the right to bind them to hold any one who might be obtained as security on the injunction bond harmless from all loss which might result from the dissolution of the injunction, or because the action of Sanders and Hall, as testified to by Bradley, is binding on the firms of which they were partners. A consideration of these propositions necessarily assumes that the jury would believe the testimony of Mr. Bradley instead of that of Mr. Hall, which is in conflict with it.

Assuming then the facts to be as testified to by Mr. Bradley, we are of opinion that the defendants, either in whole or part, are not responsible to the appellant. The employment of counsel does not confer on him, *ex necessitate*, the right to bind his clients to indemnify a third party who may become security in the progress of the suit. The power of an attorney is very extensive, but it is not equivalent to that of his client. *As such*, it has been doubted, to say the least of it, by high authority, whether he may make a compromise, although he may submit a cause to arbitration. *Holden and others, vs. Parker*, 7 *Cranch's Reports*, 434. It is true, if the compromise be *bona fide* and work no considerable hardship, courts will be slow to disturb it, and they will refuse to do so when it has been acquiesced in with a full knowledge of the facts. In the case before us, there is no evidence the facts were ever communicated to the defendants; so far from it, those of them who have been examined expressly deny all knowledge of the

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agreement between Bradley and appellant, with sanction and privity of Sanders. It did not necessarily follow, that the issuing of an injunction required a bond; that was a matter resting in the discretion of the judge who was to order it, and if he did require it and security could not be obtained without an assurance of indemnity, the client should have been so notified.

We do not think the action of Hall and Sanders, as testified to by Bradley, binding on the firms of which they were members, unless they subsequently acquiesced in it. There is not only no proof they ever did so, but on the contrary, the evidence is distinct and uncontradicted, that they neither authorised or subsequently ratified what was done by Mr. Bradley in so far as his engagement with appellant is concerned.

The question involved in the case is not, *strictly* speaking, one of the authority of a partner to bind his co-partners, but one of *agency*. Mr. Bradley was distinctly notified the agency had been created and defined by a written instrument. Had he consulted it, as, perhaps, it was his duty, he would have seen that the agency had been delegated to three persons and not to one. A power to three cannot be executed by one of them; nor is there anything clearer or better established, than that an agent cannot delegate his authority to another, the maxim being *delegatus non potest delegare*.

There is no necessity for our examining in detail the prayers, inasmuch as the views we have expressed plainly indicate our opinion to be, that in the case made by the record the plaintiff cannot recover. We think, however, there can scarce be a doubt, that on the facts contained in it, an action could be maintained against Mr. Sanders and a recovery had against him.

Judgment affirmed.

NOTE BY THE REPORTER.—The case of *Woolfolk vs. Baltzell*, referred to in argument in this case, was an action of *assumpsit* by Jacob and Charles Baltzell against Woolfolk, brought in Baltimore county court, in 1834. The *fourth* count in the *nar* charges, that defendant, in consideration that plaintiffs, at his request, would sell goods to one Hutchinson on credit, undertook and promised the plaintiffs to guarantee the payment, eventually, to them of the amount of the bill for such goods, and that relying on this promise of defendant, the plaintiffs did sell goods to Hutchinson to the amount of $1187.36, for which he failed to pay, &c.

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1st Exception. The plaintiffs offered in evidence the bill of goods sold by them to Hutchinson, on the 16th of February 1832, amounting to $1187.36, at the bottom of which was the following guaranty, signed by the defendant, Woolfolk: "I hereby guaranty, eventually, the payment of $1187.36, amount of Mr. Hutchinson's bill of this date." They also offered in evidence Hutchinson's promissory note to them for this sum, payable in six months, and then offered to prove that Woolfolk, before the goods were sold to Hutchinson, agreed to endorse Hutchinson's note for the amount of the purchase, and that the goods were sold on this assurance; but that afterwards the plaintiffs, at Woolfolk's request and on his assurance that he did not design thereby to change his responsibility, consented to accept the guaranty above stated, and also that Woolfolk admitted Hutchinson's death and the insolvency of his estate. The defendant objected to this proof, on the ground that it went to set aside or materially vary the written agreement alleged to have been entered into at the time the goods were sold, but the court, (MAGRUDER and PURVIANCE, A. J.,) overruled the objection and the defendant excepted.

2nd Exception. The defendant prayed the court to instruct the jury, that the plaintiffs are not entitled to recover:—1st, because the promise and undertaking of the defendant was a promise to answer for the debt or default of another, and the agreement, or some memorandum or note thereof upon which the action is brought, is not in writing, signed by the party now sought to be charged therewith; and 2nd, because if the said promise and undertaking is in any manner or under any circumstances binding on the defendant, yet the plaintiffs are not entitled to recover unless they had used all due diligence and proper means to collect the same from Hutchinson, and there is no evidence that they did so. This prayer the court refused and the defendant excepted.

3rd Exception. The defendant prayed the court to instruct the jury, that the plaintiffs are not entitled to recover in this action upon the evidence under either count, which instruction the court gave as to all the counts except the fourth, as to which they overruled the objection of the defendant and decided that there was evidence to go to the jury upon this count. To this ruling the defendant excepted.

The verdict and judgment were in favor of the plaintiffs and the defendant appealed. The judgment was *affirmed* by the Court of Appeals at its June term 1839.

THOMAS J. FLACK *vs.* MARIANNE GARLAND, EXC'R of NATHANIEL GARLAND.

Where a debtor sets up an agreement with his creditor to compound his claim by paying a certain sum in cash or notes at a specified time, as a bar

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to the creditor's claim, he must show compliance with his part of the agreement either by paying, or offering to pay, in conformity with its terms, before he can rely upon the composition.

APPEAL from the Equity Side of the Circuit Court for Baltimore city.

The bill in this case was filed by the appellant, for an injunction to restrain execution upon a judgment recovered against him in 1843, by the appellee's testator and his then partner, Elwell, whom the testator survived. The allegations of the bill are fully stated in the opinion of this court. The answer of the executrix denied the facts on which the equity of the bill rested.

The testimony chiefly relied on to support the complainant's case is that of the two Masons, composing the firm of Mason & Son. The son testifies that their firm was a creditor of Flack at the time of his failure, which they subsequently settled by receiving fifty cents in the dollar; that Garland came to their store several times and said he was a creditor of Flack, that they had better take fifty cents in the dollar, as they never could get any more, and it was partly through Garland's influence that witness took the fifty cents in the dollar after a conversation with his father; that their settlement with Flack took place July 8th, 1846, and the conversations with Garland in the latter part of 1845 or the beginning of 1846, in front of their store on the pavement, or in the store.

Mason, the father, testifies that he had repeated conversations with Garland about their respective claims against Flack; that Garland told him he had agreed to take fifty cents in the dollar; that Flack had nothing they could get hold of, and he had a conversation with Mr. Hinkley, his lawyer, and they agreed it was the best that could be done and advised witness to go and see Hinkley, which he did; that at the time of the last conversation with Garland witness had not concluded what to do, but he called and saw Hinkley, and afterwards saw his son, and they agreed to take the fifty cents, not seeing any possibility of getting any more; that Garland and he were holding out until the last conversation took place, in which Garland said that he understood that many of the creditors

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had agreed to take fifty cents and some less. In answer to additional interrogatories this witness states, "at the time I saw Garland I found he had concluded to take fifty cents. He having held out the longest I concluded to do the same. I knew Garland many years and had great confidence in his judgment, and as he had concluded to do it I concluded to do the same. I did not tell Mr. Garland I had concluded to do it. This was the last conversation I had with Garland." In reply to a cross-interrogatory, he also stated that he was influenced in some degree by Garland in taking the fifty cents, and should have delayed longer unless Garland had concluded to take it.

On the part of the defendant a witness proved that he was present at a conversation between Garland and Flack, early in July 1846, in relation to the former's claim against the latter, in which Flack stated he was about to settle with Mason, and that Mason had informed him that Garland wanted to settle his claim at fifty cents in the dollar. "Garland replied it was false; he had told Mason no such thing, and desired Flack to go then and bring Mason into his presence and let him say so to his face."

The court below, (KREBS, J.,) dissolved the injunction upon final hearing, and from the order of dissolution the complainant appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

John Stewart and *Charles F. Mayer* for the appellant.

The doctrine on which this bill is filed is eminently one of good faith. It is that where one creditor has persuaded or induced another to accept a compromise, that he shall not himself afterwards reject his own proposal and demand more than what he has induced others to accept. The testimony fully establishes the allegations of the bill implicating Garland as a party to the composition, and now to allow him or his executrix against the terms of the composition to enforce the judgment for more than one-half the demand, would be a fraud

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upon Flack and upon Flack's creditors: To bind the appellant to the composition, it is sufficient to show that otherwise a fraud would be operated upon the Masons, who, by Garland's avowed accessions to the composition, were led to accept it and relinquish one-half of their demand. In support of these positions we rely upon the following cases: 3 *Eng. C. L. Rep.*, 411, *Wood vs. Roberts.* 22 *Do.*, 89, *Good vs. Cheesman.* 2 *Term Rep.*, 763, *Cockshott vs. Bennett.* 3 *Do.*, 551, *Jackson vs. Duchaire.* 4 *Do.*, 166, *Jackson vs. Lomas.* 11 *Mees. & Wels.*, 492, *Horton vs. Riley.* 1 *Bos. & Pull.*, 286, *Stock vs. Mawson.* 3 *Anstruther*, 910, *Fawcett vs. Gee.* 5 *Bing.*, 432, *Knight vs. Hunt.* 7 *Gill*, 379, *Gardner vs. Lewis.* 13 *Ves.*, 586, *Jackman vs. Mitchell.* 15 *Do.*, 52, *Sadler vs. Jackson.* 12 *Pet.*, 178, *Clarke vs. White.* 2 *Camp.*, 383, *Bradley vs. Gregory.* 3 *Do.*, 174, *Boothby, et al., vs. Sowden.* 1 *Peere Wms.*, 751, *Pollen vs. Huband. Foster on Composition*, 1 *Lib. Law & Eq.*, 1. 16 *Ves.*, 372, *Mackenzie vs. Mackenzie.* 19 *Law Lib.*, 114. *Story's Eq.*, *sec.* 191. *Prac. in Chan.*, 310. 1 *Coxe*, 287. 8 *B. Monroe*, 599, *Cutter & Co., vs. Reynolds.*

John H. B. Latrobe for the appellee: Measured by the evidence the case put by the bill dwindles down to that which is made by the testimony of the two Masons, and rests upon the only two allegations which the appellant has attempted to sustain by proof:—1st, that Garland agreed to compound the judgment, and 2nd, that his representing to the Masons that he had done so, so far influenced them in following his supposed example as to bring this case within the decisions which make such conduct on the part of a creditor a bar to the recovery of his claim in full.

1st. Now as to the first of these points, it is clear that Garland's agreement *by itself* did not bind him to receive less than the full amount of his claim. The leading case of *Cumber vs. Wane*, in *Smith's Lead. Cases*, 146, in 19 *Law Lib.*, 111, and the cases there cited, settle this. Upon this point argument is unnecessary. There was no consideration to uphold an agreement, either to take a less sum or to exchange the superior

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security of a judgment for a claim on open account or promissory note.

2nd. The only considerations to support such an agreement is to be looked for in what took place between Garland and the Masons. Assuming it to be true, for the argument, that Garland told Mason he had agreed to compound, was this, even if followed by Masons doing the same in his reliance on Garland's judgment, such an agreement between Garland and the Masons as furnished the consideration that supported the agreement between Flack and Garland? None of the cases have gone this length. The most prominent are given in the notes in *Smith's Lead. Cases*, to *Cumber vs. Wane*. In *Wood vs. Roberts*, 3 *Eng. C. L. Rep.*, 411, there was an express agreement between *two creditors*, amounting to "if *you* will then *I* will." In *Steinman vs. Magnus*, 11 *East*, 390, there was a regular agreement in writing between the debtor and his creditor. In *Good vs. Cheesman*, 22 *Eng. C. L. Rep.*, 89, there was also a regular agreement in writing to grant a release on terms. So also in *Norman vs. Thompson*, 4 *Wels., Hurls. & Gordon*, 755. In the cases cited on the other side from 13 *and* 15 *Ves.*, 2 *and* 3 *Camp.*, and 12 *Pet.*, there were in all of them special agreements to which the creditors were parties, and whereby, binding themselves to each other, they furnished the consideration which otherwise, under the authority of *Cumber vs. Wane*, would have been wanting. Putting the broadest construction upon the testimony of the Masons it amounts to no more than this, that Garland told them what he had proposed to do, leaving them to follow his example or not as they pleased. It is idle to say there was any agreement between Garland and the Masons, such as existed in the cases referred to where the parties either made a special contract or signed a release of the debtor, because, as the elder Mason testifies, he did not even tell Garland in their last conversation on the subject what he had concluded to do.

But even if we are wrong here and there was such an agreement between Garland and the Masons as furnished a consideration for the agreement between Flack and Garland, and assuming such an agreement, still, under the circum-

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stances, the appellant could not avail of it because of the want of a tender of performance on his part. If any agreement was made it was in July 1846. If there was any agreement it was to pay cash or give four months' notes. The *scire facias* did not issue till January 1850. In the interval there was no tender of either money or notes, and this alone is fatal to the appellant. 2 *Maule & Selw.*, 119, *Cranley vs. Hillary.* 12 *Pet.*, 191, *Clarke vs. White.* It cannot be said that this is a case where tender was unnecessary because it was known it would be refused; because the bill dwells on the friendliness of the relations of the appellant and Garland in his lifetime, and he survived the alleged composition quite long enough to have received either the notes or the money. In truth nothing was said about a tender until the bill for injunction was filed.

But we say the Masons are in error in their recollections of what took place with Garland, and have magnified ordinary conversations about a common debtor into an agreement to compound. And again we say that the appellant is here asking specific performance of an agreement, the consideration of which was a supposed agreement between him and Garland, and being in equity should come with clean hands if he is to find relief here. In other words, his right to have the injunction perpetuated must rest upon the fact that the Masons settled with him under an agreement with Garland that he would do the same, or having understood from Garland that he would do so, and yet Flack having ascertained from Garland that he would not compound, completed the composition with the Masons without informing them of the fact. If this was so, then his silence was a fraud upon the Masons, and he can have no standing here. Or if he informed the Masons of Garland's refusal and they settled notwithstanding, then such settlement ceases to afford a consideration for the agreement, which it is the object of the present bill to set up, admitting it in every respect to be otherwise satisfactorily made out. The appellant is in a dilemma and may select the horn he prefers. We contend therefore:

1st. That as between Flack and Garland alone, admitting the agreement as alleged, it was without consideration and void.

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2nd. That looking to what took place between Garland and the Masons, there was no such agreement between them as could furnish a consideration to support the alleged agreement between Flack and Garland.

3rd. Even admitting that such agreement was supported by a sufficient consideration, there was not such tender of performance on the part of Flack as authorises it to be set up as a bar to the recovery by Garland of the entire indebtedness.

4th. That there was, however, not only no such agreement between Garland and the Masons, but that, even admitting the declarations of Garland in regard to his willingness to compound, the Masons were not influenced by them, but acted on their own judgment in the matter.

5th. That in point of fact Garland made no such declarations as are sworn to by the Masons, and that they are mistaken in their recollection, as appears from the testimony in the record.

6th. That, if for no other reason, Flack is not entitled to the relief prayed by his bill, because he either was guilty of fraud in concealing from the Masons Garland's denial of what they alleged he had stated, or, if he told them and they compounded notwithstanding, their conduct destroyed the consideration, such as was necessary to support the alleged agreement between Flack and Garland to compound.

Le Grand, C. J., delivered the opinion of this court.

The bill in this case prays an injunction (which by the Superior Court of Baltimore city, where the bill was filed, was granted) against a judgment of Baltimore county court recovered against the appellant, Flack, by Nathaniel Garland, of whom the appellee is executrix. The judgment was rendered for a debt due by Flack to Garland and Elwell, of whom Garland was survivor. The bill alleges that Flack failed in business in the year 1842; that after some time had passed, during which he was endeavoring, having the confidence of his creditors, to make most available for their satisfaction the means left to him, he finally proposed to his creditors a composition, by which on paying fifty cents in the dollar he was to be released from his liabilities, determining and declaring

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that if such composition should fail to be effected, he would seek release by application for the benefit of the insolvent laws. The bill states that among his creditors, whose good will he thus had, was Garland, who, although during the suspense of the appellant's affairs before the composition was projected, had obtained judgment, yet had taken that step with no adverse purpose, but merely to preserve the highest evidence of his claim. The bill states that after judgment was thus had by Garland, (which was rendered in the year 1843,) he, (Garland,) in the year 1846, and at the period when the composition referred to was in train, acceded to it and agreed, like the rest of the appellant's creditors, to accept the one-half of the amount of his claim in satisfaction of it; to be paid on demand made by Garland, in money, or by the appellant's note at four months. The appellant states that, by Garland so acceding to the composition, all his debts being provided for, he forbore applying for the benefit of the insolvent laws, and again embarked in business;—but that meanwhile Garland died, without receiving or applying for the composition money; and that his executrix, the appellee, unmindful of the adjustment thus binding her testator, was about to issue execution upon the judgment. The bill further states that Garland went forth among the other creditors to solicit and urge them to come into the composition, representing to them that he had acceded to it—stating that fact to persuade them to follow his example.

The proceedings in the cause show that the judgment was obtained at January term 1843; and that on the 5th January 1850 a *scire facias* was issued, on which there was a *fiat*, and then an appeal to this court, where the judgment was affirmed at December term 1852.

The only testimony in the cause which can be regarded as tending, in any degree, to show that Garland had agreed to the composition alleged in the bill, or, that by his persuasion or statements, he induced others to assent to such an arrangement, is that of the Messrs. Masons. This testimony is very far from being decisively conclusive of the question when the other testimony is considered in connexion with it. But, be

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this as it may, it is not important to the decision of the case we should pronounce on its efficacy, for, even were it conceded that the composition had been clearly made out, yet the complainant would not be entitled to the relief which he seeks. By its terms the appellant was to pay the sum agreed to be accepted, either in cash or in notes, at four months. It is not pretended he did either, nor that he ever made an effort to do so. He did nothing so far as this record discloses until June 1853, when he filed his bill praying that the execution of the judgment might be enjoined. For several years he did nothing; he neither paid the money, delivered the notes, or offered to pay the money or to deliver the notes. We therefore think, on his own showing, that he has no equity. In the case of *Green & Trammell, vs. Trieber*, 3 *Md. Rep.*, 36, this court said, when speaking of arrangements similar to the one relied upon here, that "the debtor offers his property to his creditors in payment of their claims, or for distribution according to such priorities as he may prescribe. *Payment* being the proposed object of the assignment, it must not contain any provision to defeat or hinder this purpose, beyond such reasonable delay as may be incidental and necessary to the proper execution of the trust." Every composition, in its very nature, contemplates payment in conformity with its terms. In the case now before us, if any was agreed upon, the appellant has wholly failed to perform his part of the contract. If he wished to avail himself of an arrangement for his benefit, he should have performed his part of it, or, at least, offered to do so. His failure to comply is a complete answer to his present complaint.

Decree affirmed with costs.

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PARKER VEIN COAL COMPANY *vs.* MICHAEL P. O'HERN.

A party to a contract cannot, by his own act, prevent another from performing his engagement, and then complain that such other party has not kept its stipulations.

Where a party himself voluntarily purchases at trustee's sale land which another party had agreed to purchase at said sale and convey to him, such purchase, even with the consent of the other party, in the absence of any qualification of its legal effect, operates in equity as a waiver of the agreement.

APPEAL from the Equity Side of the Circuit Court for Allegany county.

The bill in this case was filed for the sale of a tract of land called "*Timothy Level*," three-fifths of which belonged to the appellee, O'Hern, and the other two-fifths to parties claiming under Samuel Jackson. Pending this proceeding and before a decree for the sale, O'Hern and Otis P. Jewett, the agent for the Parker Vein Coal Company, entered into the following agreement:

"Agreement, made this 10th day of December, A. D., 1852, between Michael P. O'Hern, of Cumberland, Allegany county, in the State of Maryland, and Otis P. Jewett, of the city, county and State of New York:

"The said Michael P. O'Hern, for the consideration hereinafter expressed, agrees to sell to the said Otis P. Jewett, his executors or assigns, all that certain tract or piece of land called '*Timothy Level*,' patent and commonly known by the name of the Jackson Property, containing two hundred and thirty-six acres and three-fourths of an acre of land, lying and being in Allegany county and State of Maryland. And the said Michael P. O'Hern, for himself, his heirs, executors and administrators, covenants and agrees with the said Otis P. Jewett, his heirs and assigns, to execute and deliver to said Jewett, his heirs or assigns, a good and sufficient deed or conveyance of said property as soon as practicable after the sale of a certain undivided two-fifths part thereof, under and by virtue of a proceeding now pending in Allegany court, or as soon as said O'Hern shall

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perfect a title to said two-fifths, should he be able to do so previous to said sale. And the said Otis P. Jewett binds himself, his heirs and assigns, to pay to the said Michael P. O'Hern, his heirs or assigns, the sum of $50,000 for the said premises, in manner following: $6000 within twenty days from the 30th of November 1852; $6000 within six months after the expiration of the twenty days aforesaid; $6000 within twelve months from the day of the payment of the last mentioned $6000; $5000 by an acceptance, payable in sixty days from the date of these presents at the Bank of North America, New York city; $15,000 by a bond and mortgage on said premises, payable in two years after date, with interest at six per cent., payable semi-annually, to be delivered to said O'Hern on the delivery of the deed for said premises.

"And whereas, the said O'Hern has not yet perfected his title to the undivided two-fifths of the said premises, but expects shortly to do so, as before mentioned, the remaining sum of $12,000, part of the said $50,000, shall be paid to the said O'Hern in the same manner, as to time and amounts, as he himself shall be obliged to make payment for said two-fifths, so far as the amount he shall pay therefor is concerned; and the difference between what he shall pay for said two-fifths and the said $12,000, shall be paid to said O'Hern on delivery of the deed for said premises or in a mortgage on said premises, at the option of said O'Hern.

"It is hereby mutually understood and agreed, that the property herein above described is to be transferred and conveyed to the Parker Vein Coal and Caledonia Coal Companies by said Jewett.

"In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written. M. P. O'Hern, (Seal.)
Otis P. Jewett, (Seal.)"

This agreement was subsequently assigned with all its conditions to the Parker Vein Coal Company by Jewett, with O'Hern's assent, and accepted by the company, who agreed to perform all the conditions in it.

The decree for the sale then passed, and at the sale, by an

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agreement between the attorney and agent of the company and O'Hern, the company became the purchaser of the whole tract for $71,309.37. The company then paid to O'Hern all the payments under their agreement except the $15,000, and then filed a petition in which they insist, that O'Hern having failed to perfect his title and they having been compelled to purchase said two-fifths at a price more than $15,000 above the $50,000 for which O'Hern had agreed to convey the whole property, he is not entitled to said $15,000, and pray the court to direct the whole amount to be audited to them.

O'Hern, by his answer, contends, that by the agreement, the company were to pay the $15,000 for the three-fifths in any event, and claims that this sum shall be audited to him or his assigns.

The court below (PERRY, J.,) decided, that according to the true construction of said agreement, O'Hern, or his assigns, were entitled to the $15,000, and directed the auditor to state an account accordingly. From this order the company appealed.

The cause was argued before LE GRAND, C. J., TUCK and MASON, J.

J. Dixon Roman for the appellants, argued:

1st. That O'Hern agreed to convey the whole property for $50,000, and having failed to perform this agreement, he cannot ask a court of equity to give him the purchase money at least without *doing equity*, by allowing the purchasers to retain the excess which they were obliged to pay.

2nd. That the purchase of the property by the appellants was at the request or at least with the consent of O'Hern, which precludes him from objecting on that ground.

Wm. Price for the appellee, argued:

1st. That there was no covenant on the part of O'Hern to convey to the company two undivided fifth parts of the tract called "*Timothy Level.*"

2nd. That if they ever had such a covenant, they have re-

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leased or waived it by purchasing the land themselves at the trustee's sale, and thus preventing O'Hern from acquiring the title as contemplated by the agreement. *Chitty on Cont.*, 738, 739. 9 *Gill*, 294, *Rodemer vs. Hazlehurst*.

3rd. If they had such a covenant and have not waived it, they have suffered no damage.

4th. If they had such a covenant and had sustained damage which they have not waived, they must bring their action to have their damages assessed by a jury.

5th. O'Hern is entitled, upon every view of the case, to have the money paid over to him, and to his costs.

TUCK, J., delivered the opinion of this court.

A proceeding in equity was pending for the sale of a tract of land called "*Timothy Level*," of which the appellee, O'Hern, owned three-fifths, the residue belonging to persons claiming under Samuel Jackson. On the 10th of December 1852, before a decree was passed, O'Hern, and Jewett the agent of the appellants, entered into the agreement set out in the record, which was afterwards assigned by Jewett to the company and by them accepted, with O'Hern's consent, subject to all its terms and conditions. A decree was passed for a sale and distribution of the proceeds, on the 26th of April 1853, and a sale made on the 30th of June of that year. At this sale, as appears by the petition of the appellants and the answer of O'Hern, the whole property was purchased by the agent of the appellants, under an arrangement between him and O'Hern, by which the appellants became owners of the property at $71,309.37, being much more than they had agreed to pay O'Hern for it. All the payments have been made except the last instalment of $15,000. The company now insists, that O'Hern having failed to perfect his title to the whole property, and they having been compelled to purchase the two-fifths, which he had agreed to procure and convey to them, at a price much above the sum they had agreed to pay, he is answerable for such non-compliance with his contract; and they claim to be compensated by having the sum of $15,000 audited by them, instead of O'Hern or his assignees.

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The parties to the agreement contemplated the purchase of the whole land by O'Hern at the trustee's sale and the possibility of his buying the outstanding two-fifths before that time, but it is not clear by any means that they expected O'Hern to lose what these shares might cost over and above the rate at which he had sold the others; on the contrary, it would seem that if he succeeded in buying these shares, even at a greater rate, the excess over the $12,000 retained by the company was to be paid by them. Under this view of the contract, the company are not in any worse position, as vendees of the trustee, than they would have occupied if O'Hern had bought and conveyed to them. But we deem it unnecessary to place a construction on this part of the instrument, because we take it to be very clear, that a party cannot by his own act prevent another from performing his engagement and then complain that he has not kept its stipulations. *Rodemer vs. Hazlehurst*, 9 *Gill*, 288. *Rail Road Co. vs. Resley*, 7 *Md. Rep.*, 313. If this contract contained an agreement to purchase and convey the outstanding shares, as contended by the appellants, the purchase by them at the trustee's sale, even with O'Hern's consent, in the absence of any qualification of the legal effect of that act, operated in equity as a waiver. There is nothing here to show that the company was under any necessity or compulsion to buy the land. It was their voluntary act, under an arrangement with O'Hern, and he may well object to their ascribing to it an effect which does not appear to have been contemplated by him or them at the time.

Not perceiving that the appellants have any cause of complaint against the action of the court below, its order will be affirmed.

Order affirmed, with costs.

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Robert Purviance, Jr., Permanent Trustee of William Bosley, *vs.* William W. Glenn and others, Exc'rs of John Glenn.

The insolvent courts have no jurisdiction to compel the *executors or administrators* of deceased trustees to account in these courts for the trust estate.

These courts have exclusive jurisdiction in the distribution of insolvents' estates and may proceed in a summary way against the *trustees* for default or neglect of duty.

In regard to the particular classes of trusts confided to them, these courts, in the exercise of a special authority, proceed upon principles of equity without being courts of equity.

The trustee of an insolvent may proceed to collect the property of the insolvent in courts having jurisdiction of the subject matter, as in other controversies, but when collected he must account for and distribute it in the insolvent court.

These courts proceed under special powers conferred by acts of Assembly, and the authority invoked must be shown to be within the limited jurisdiction.

Appeal from the Court of Common Pleas for Baltimore city.

This is an appeal from an order of the court below, sitting *in insolvency*, passed under the following circumstances:

Bosley petitioned for the benefit of the insolvent laws and John Glenn was appointed his permanent trustee in March 1828. In July 1853 Glenn died, and in October of that year Purviance, the appellant, was appointed permanent trustee in his place, and shortly thereafter filed his petition in the court below against Glenn's executors, in which he states substantially, that Glenn received large sums of money and property belonging to the insolvent's estate, but died without having settled the trust or in any way accounted for the property so received by him. The petition then prays that the executors may render an account of all moneys and property received by their testator as such trustee, and that the same with interest may be paid and delivered to the petitioner.

The answer of the executors admits that considerable property of Bosley passed into the hands of their testator as his

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trustee, but alleges that said Glenn was the attorney and representative of the largest portion of Bosley's creditors, and was able and willing at all times to meet their demands, and that if any balance remained in his hands it was because in his multiplied engagements the trust remained unadjusted, he having never been required by the parties interested to close it; and because, as petitioner well knew, their testator claimed a large portion of the fund as his own, by virtue of an agreement between him and the creditors. The answer further alleges the willingness of respondents to account for the fund and pay over whatever may be due the petitioner if the court should assume jurisdiction of the matter, but it insists that though the court has power to control and direct trustees of insolvents it has no summary jurisdiction over the representatives of trustees; and that inasmuch as respondents have defences and claims upon the trust fund which can only be properly heard and determined in a court of equity, they except to and deny the jurisdiction of the Court of Common Pleas, and ask that the petition be dismissed.

To this answer the petitioner excepted as insufficient for various reasons, which need not be stated. The court, (MARSHALL, J.,) ordered the petition to be dismissed; "the court thinking that they have no jurisdiction over the executor in this case, but that he must be proceeded with as other debtors of the insolvent estate, at law or equity." From this order the petitioner appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

T. Parkin Scott for the appellant, argued:

1st. That the county court, under the late, and the Court of Common Pleas under the present constitution, has the sole and exclusive authority and jurisdiction to appoint trustees of insolvent debtors; *and also* the sole and exclusive authority and jurisdiction to administer and distribute the assets of an insolvent's estate. 4 *G. & J.*, 394, *Glenn vs. Karthaus*. 5 *Gill*, 179, *Alexander vs. Ghiselin*. 7 *Do.*, 170, *Carter vs.*

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Dennison. *Ibid*, 398, *Gardner vs. Lewis.* 9 *Do.*, 240, *Powles vs. Dilley.* 1 *Md. Rep.*, 143, *Pierson vs. Trail.* *Ibid*, 471, *Waters vs. Dashiell.* 2 *Do.*, 17, *Glenn vs. Gill.* 3 *Do.*, 463, *Manahan vs. Sammon.* To enable the courts to exercise the authority and jurisdiction thus given they must have power over trustees appointed by them, *and also* over their assignees in fact and in law. *Acts of* 1805, *ch.* 110, *secs.* 4, 10. 1819, *ch.* 84, *sec.* 8. 9 *Gill*, 240. The Court of Common Pleas is limited in jurisdiction as to *subjects*, but has *exclusive* and *unlimited* jurisdiction in regard to the matters confided to it. *Cons., art.* 4, *sec.* 10. We therefore say the order appealed from must be reversed and the case sent back for an account and delivery of assets as prayed in the petition.

2nd. But it is objected that the appellees have defences and claims upon the trust fund which can only be properly heard and determined in a court of equity, and that they have a claim in virtue of an agreement between Glenn and the creditors. But the court of chancery, as the cases cited show, has no jurisdiction to settle the claims of creditors, and that must be done before Glenn's proportion of those claims can be ascertained. And assuming for the argument, that he has a claim, a court of equity could not adjust it without assuming jurisdiction of the insolvent's estate, which it is forbidden to do. 1 *Md. Rep.*, 143, 471. 2 *Do.*, 17. 3 *Do.*, 463. Again, conceding that the account between the estate of the insolvent and the executors of the deceased trustee ought to be adjusted according to the practice and principles of courts of equity, it is settled law that the courts to which jurisdiction in insolvency is exclusively given must proceed and determine according to equity. They must surrender the property to the present trustee and then come in with their claim. 7 *Gill*, 172. *Ibid.*, 398. Until the present trustee knows what property was sold by the late trustee, and what claims were collected by him in his lifetime, and until he has possession of the title-papers, books and accounts of the insolvent, he cannot reasonably proceed to execute and complete the trust.

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F. K. Howard and *S. T. Walkis* for the appellees, argued:

1st. That the Court of Common Pleas, sitting in insolvency, is a court of limited jurisdiction, clothed with no powers except those specially given by acts of Assembly; which acts have not in any case extended the summary jurisdiction of the court beyond the person of a delinquent trustee, leaving the remedies of his successor and of creditors to be exercised against his representatives after his decease through the ordinary courts of law and equity. The 10th sec. of the act of 1805, ch. 110, giving summary powers to the court, confines itself exclusively to existing trustees. The act of 1819, ch. 84, sec. 8, is confined to provisional trustees *failing to comply*. 4 *G. & J.*, 394, was the case of a provisional acting trustee refusing to give up the assets, and was clearly a case for summary proceedings. See also *acts of* 1832, *ch.* 203, *sec.* 3; 1833, *ch.* 173, *secs.* 5, 6, and 1835, *ch.* 235. The concession that suit may be brought at law on the trustee's bond yields, the point that the jurisdiction of the insolvent court is not *exclusive*.

2nd. That the jurisdiction contended for by the appellant would involve the settlement of the deceased trustee's estate in the insolvents' court, and the exercise of the powers of the orphans court, as well as the general jurisdiction of equity over the estates of decedents. No such extraordinary jurisdiction was ever contemplated by the legislature in giving the insolvents' court the right of making distribution according to equity. *Acts of* 1836, *ch.* 133, *sec.* 2. 1798, *ch.* 101, *sub-ch.* 14. 1820, *ch.* 174, *sec.* 3. 1831, *ch.* 315, *sec.* 7. 1 *H. & G.*, 96, *McCulloh vs. Dashiell.* 7 *Gill*, 172. 4 *Md. Rep.*, 529, *Dent vs. Maddox.* 6 *Do.*, 347, *Lowe vs. Lowe.* All the authorities cited on the other side to this point are cases of *distribution*, and in that particular the insolvents' courts follow the courts of equity.

TUCK, J., delivered the opinion of this court.

We are of opinion that the petition of the appellant was properly dismissed, for the reason stated by the Court of Common Pleas.

It is very clear, as shown by the appellant's counsel, that

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the Court of Common Pleas has exclusive jurisdiction in the distribution of insolvents' estates in the city of Baltimore, and that it may proceed in a summary way against trustees, under the circumstances mentioned in the acts of Assembly referred to on this point. But it does not follow, that these powers may be exerted against their executors or administrators for the purpose of compelling them to account in that court for the trust estate. This action of the court against the trustee is based on some alleged default or neglect of duty in his capacity as such, which cannot be imputed to his executor or administrator. The latter derives no authority from the insolvents' court, is not under its control nor accountable to it, any more than the trustee is to the orphans court.

Although trusts are peculiarly the subject of equity jurisdiction, this particular class of trusts has been confided to courts of common law, in regard to which, in the exercise of a special authority, they proceed upon principles of equity without being courts of equity. *Carter vs. Dennison*, 7 *Gill*, 157. We must not mistake this control of the court over the trust funds, for the power of the trustee to institute proceedings in the proper tribunals for the purpose of collecting them together. Property belonging to the insolvent may be in different places, or suits in equity may be necessary to vacate assignments; in all which cases it is manifest, that the trustee can proceed only in the courts having jurisdiction over the subject matter, as in other controversies. But when the suits are terminated, the funds must be accounted for in the court from which the trustee derives his authority. So exclusive is this jurisdiction, that where a bill was filed in equity to vacate a fraudulent deed and the deed avoided, that court was not allowed to retain the case and grant complete relief by distributing the proceeds, nor even to the extent of making sale of the property by a trustee of its own appointment, but the case was left to the power and action of the trustee in insolvency. *Jamison vs. Chesnut*, *Ante*, 34. The prevention of confusion and possible conflict of jurisdictions is one of the reasons assigned for confining the settlement of these trusts to one and the same tribunal. 5 *Gill*, 138. *Waters vs. Dashiell*, 1 *Md. Rep.*, 471. This consideration

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applies with equal force in restraining these courts from drawing within their special jurisdiction matters more properly cognizable in other courts, and thereby, as incident to the duty of making distribution of the insolvent's estate, possessing themselves of the power to marshall the assets of deceased trustees, when the laws have appointed different tribunals for the settlement of their estates.

If the estate be insolvent, (and we do not think the principle is affected by the admission of assets in this case,) the common law court, sitting in insolvency, cannot ascertain the amount due by it on account of the trust without investigating the whole personal estate, determining questions of priority and making a ratable dividend among the creditors. This, it is argued, can be done as readily as a plaintiff's proportion of assets is ascertained in suits at law. Probably, looking to the different manner of taking the account, it may be accomplished with greater justice to the parties than in a suit at law; but we must pay regard to judicial systems as we find them established. At law, relief is granted in the exercise of common law powers by courts of general jurisdiction, in which administrators have always been impleaded; whereas, these courts, in matters of insolvency, proceed under special powers conferred by acts of Assembly, and the authority invoked must be shown to be within the limited jurisdiction. *Bowie vs. Jones*, 1 *Gill*, 208. Besides, if this proportion of assets can be determined by the court, sitting in insolvency, as in cases at law against the executor or administrator, why may not the proceeds of the real estate be made applicable there also, as in suits in equity when the personal estate is insufficient? Indeed, if the appellant's present pretensions be acknowledged as within the purview of the exclusive jurisdiction of the Common Pleas, as a court of equity, *pro hac vice*, it would seem to be quite as appropriate that it should determine the claimant's dividend of the proceeds of the realty as to call for an account of the personal assets. Executors and administrators are liable only in respect of their relation to the personal estate, and on the same principle the heirs and devisees would be responsible as representing the real assets, and therefore subject to be called on to make good

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thereout any deficiency of the fund primarily liable for the payment of debts. But it is manifest, that these courts have no such jurisdiction over the real estate of a deceased debtor.

It may be, as urged on the part of the appellant, that defences will be relied on by the appellees, if sued elsewhere, by which the claim may be defeated altogether. On this point we intimate no opinion. But if the remedy is gone by lapse of time, the fault is not with the present trustee. The creditors had ample redress under the acts of Assembly against the former trustee for any supposed default, and cannot now offer this suggestion as a ground for clothing the Common Pleas with powers not granted by the constitution and laws.

Order affirmed, with costs.

Frederick Roloson *vs.* David Carson, Jr.

Mistakes committed by the arbitrators in drawing incorrect inferences or forming erroneous judgments or conclusions from facts, will not vitiate their award.

A mistake that will vitiate an award must be gross and manifest, and of some fact by which the arbitrators were deceived and misled.

The courts have by a long course of decisions manifested a strong inclination to sustain the judgments pronounced by arbitrators.

It is not necessary that the parties should have *notice* of or be present at the meeting of the arbitrators at which the award is made up and signed.

Arbitrators, like jurors, have the privilege of consultation in private for the purpose of making their award.

A prayer that an award is void because the arbitrators, without previous notice to, and in the absence of, the other, read an *ex-parte* affidavit of one of the parties, "though the jury believe it had *little or no* influence on the minds of the arbitrators," is defective, because it would have justified the jury in vacating the award for what they believed had *no effect* upon the decision.

A more liberal and reasonable interpretation of awards is now adopted than formerly; every reasonable intendment will be made in their favor, and a construction given to them that will support them, if possible, without violating the rules adopted for the construction of written instruments.

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A prayer that an award was void because of improper conduct of the arbitrators, without leaving to the jury to find any facts constituting the misconduct, is erroneous.

A prayer that an award is void because not in accordance with the submission as proved by *one witness*, is defective, there being *other witnesses* who testified in regard to the terms of the submission.

Where the appellant has received *no injury* from an erroneous ruling of the court below, the case will not be sent back under a *procedendo*.

Under the act of 1834, ch. 233, sec. 11, the court has a *discretion* as to what time the exceptions shall be prepared or signed, provided they are completed prior to the verdict, and the exercise of such discretion is not a subject of revision on appeal.

As a general rule, the most appropriate time to prepare an exception is immediately after the decision excepted to is made.

APPEAL from the Superior Court of Baltimore city.

Assumpsit by the appellant against the appellee, to recover for damages sustained by reason of the alleged defective and unworkmanlike manner in which defendant had built a warehouse under an agreement with the plaintiff, in consequence of which the warehouse fell down. Plea, *non assumpsit*, with an agreement that either party may give in evidence any matter which he could rely on by any form or mode of pleading.

1*st Exception.* The plaintiff offered in evidence the agreement, by which the defendant contracted to build a warehouse for the plaintiff, adjoining that now occupied by him and corresponding with the same, for $2500. "The buildings now on the premises to be taken down, as also the south gable-end wall of old warehouse, all of the bricks to be properly cleaned and piled ready for use. The joist of old building to be stayed and shored up to receive the girders, which is to be used in the place of the wall." He then proved by Harris, that after a part of the warehouse fell down, the plaintiff and defendant mutually agreed to refer the matter to witness and John Nant, to ascertain the cause of the damage, and at whose expense it should be repaired or who was liable for the damage done; that they met on the premises, in the presence of the parties, and called in Mr. Curley to their assistance; that the three examined the premises, heard the statements of both parties, held three or four meetings, at all of which, except that at which

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the witnesses were examined and that at which the award was made out and signed, both plaintiff and defendant were present; that the agreement under which the warehouse was built was produced by the plaintiff at the second or third meeting; that at one of the meetings, five witnesses were examined at the instance of the plaintiff; that neither of the parties was present at the examination of the witnesses, but written questions were left by the plaintiff with the arbitrators to be propounded to the witnesses; that afterwards, the arbitrators met and made out the award, which was offered in evidence and set out in full in the opinion of this court.

Much testimony was then offered by both parties chiefly as to the strength and proper construction of an old foundation wall which defendant claims he built upon by direction of plaintiff, who instructed him to allow the old wall to remain. The plaintiff alleged and offered evidence that the old wall was strong enough, and that defendant built upon it in an improper manner. On the other hand, defendant offered in evidence that the old wall was badly built and that the fall was occasioned thereby. It was also proved, that at a meeting of the arbitrators, held before the award was made, an affidavit of the defendant was sent in by him, which was received and considered by the arbitrators, but one of them states it had no influence in forming his judgment; that plaintiff was not present at this meeting, nor was any previous notice given to the parties to attend.

The plaintiff then, to prove the damage sustained by the fall of the building, offered to prove there was a quantity of pork and other provisions belonging to the firm of plaintiff and one Littig, who held possession of the premises at the time of the accident as tenants of the plaintiff, injured thereby; but it being admitted there was another suit on the docket by this firm against the defendant for this damage, the court, (FRICK, J.,) on motion of defendant, rejected the evidence so offered, and to this ruling the plaintiff excepted.

2nd Exception. The plaintiff having excepted to the ruling of the court in regard to a question propounded to a witness, his counsel proceeded to write his exception, and with the

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sufferance of the court, the examination of the witnesses, meanwhile, was suspended. But after waiting fifteen minutes, the court ordered the examination to be proceeded with, against the objection of plaintiff's counsel, who had not completed the writing of his exception. The court announced, that as there was associate counsel for the plaintiff, the examination of the witnesses must be proceeded with, and the counsel could write his exception at any time before the verdict was rendered and the court would sign it. To this ruling the plaintiff excepted.

3rd Exception. This exception was taken by the plaintiff to the refusal of the court below to grant his six prayers, all of which are sufficiently stated in the opinion of this court.

The verdict and judgment were in favor of the defendant and the plaintiff appealed.

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The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

Vivian Brent for the appellant, stated, that the main questions in this case arise under the third exception relating to the validity and effect of the award, but that he desired, however, an expression of this court's opinion upon the second exception. He then argued the questions arising upon the third exception.

Before considering the law of awards as applicable to the prayers contained in this exception, I desire to submit some authorities as to the legal merits of the plaintiff's right to recover damages on the facts detailed in the statement of evidence. Defendant was the agent of the plaintiff for hire to build the house, and he was in the business or profession of house-builder. The rule in such case is, that he is bound to have competent skill and is liable for loss occasioned by his ignorance, neglect or want of skill. *Paley on Agency*, 5, 10, 76, 77, 78. 14 *Mass.*, 282, *Taft vs. The Inhabitants of Montague.* The very undertaking to build for hire is a representation that he had the requisite skill and judgment, and *would use* that skill and judgment, and his *breach of contract*

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may be given in evidence to reduce his claim for compensation *or as the foundation of a cross-action.* 3 *Starkie's Rep.*, 6, *Duncan vs. Blundell.* 1 *Camp.*, 38, *Farnsworth vs. Garrard.* 1 *Car. & Pay.*, 352, *Moneypenny vs. Hartland, et al.;* also same case in 2 *Car. & Pay.*, 378. And even where the specific price is agreed on and the employer has encouraged the agent in the *improper work* the employer has a remedy by cross-suit. 3 *Starkie on Ev.*, 1770. 2 *Saund. Pl. & Ev.*, 962. But it will be said on this that Roloson substituted his own judgment and adopted the stone wall as *a foundation.* On this point see the case of *Duncan vs. Blundell* cited above. But no subsequent acts of Roloson can control or change the meaning of the *contract.* 6 *H. & J.*, 418, *Key vs. Parnham.* 1 *H. & G.*, 74, *Ringgold vs. Ringgold.* 10 *G. & J.*, 279, *Vincent vs. Chapman.* If Roloson accepted the old stone wall and gave no specific instructions where or how to place the columns it was then left to the skill and competent judgment of the builder, and he should have examined the mortar and the sides of the wall and placed the columns most judiciously, and secured them with proper plates and distribution of pressure as shown in the evidence. Again, it is for the jury to say how much the accident was referable to the bulging of the *south wall.* Moreover there is no proof of the exercise of the personal skill or judgment of Carson. The columns were placed and sighted by White in his absence and without instructions, and we have White's *own admissions* in evidence. Carson is responsible for the want of skill and care of his agents. 2 *Kent's Com.*, 279. 6 *G. & J.*, 291, *Steam Co. vs. Hungerford.* See further, as to damages by way of deduction from the stipulated price, *Thornton vs. Place,* 1 *Moody & Rob,* 218.

The award sought to be impeached by the prayers under review is clearly obnoxious to the objections taken in those prayers. The principles of law on this subject are well established, and each of these prayers ought to have been granted. In England it is clear that no award can be impeached for misconduct of arbitrators except by bill in equity, unless made a rule of court. 8 *East,* 344, *Braddick vs. Thompson.* 1

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Saund. Rep., 32, *Birks vs. Trippet, note (a.)* 59 *Law Lib.*, 156. But even there you may, by pleading, invalidate the award by matter on its face. 11 *East*, 191, *Fisher vs. Pimbley.* Or by pleading extrinsic matters. 9 *Eng. C. L. Rep.*, 54, *Cargey vs. Aitcheson.* Or that there was no award, and support it by showing fraud in the submission. 18 *Eng. C. L. Rep.*, 242, *Sackett vs. Owen.* But even in England this whole doctrine is favorably expounded for the impeachment of awards, by *Mr. Saunders* quoting *Mr. Philip on Evidence.* 1 *Saund. Pl. & Ev.*, 186. And where nothing can be done under the award but by suit, the court will leave all objections to be decided in the suit. 1 *Bac. Abr.*, 376. 7 *Term Rep.*, 74, *Pedley vs. Goddard.*

But be that as it may, no such rule has ever prevailed in Maryland, and there being no reason in it, we are free to follow our own practice, which is the simplest and most convenient. Where the award sets forth the facts as here, and draws erroneous inferences of law on the facts, it is vacated at law. 2 *H. & McH.*, 478, *Oliver vs. Heap.* It is expressly decided, that any irregularity in the arbitrators is a defence in Maryland, (9 *G. & J.*, 11, *Shriver vs. The State*,) contrary to the English law as laid down in 63 *Law Lib.*, 371. And want of notice is fatal in Maryland, (3 *Gill*, 49, *Bullitt vs. Musgrave*,) not so at law in England. We therefore consider that the irregularities or improprieties of arbitrators are available at law in Maryland, as by bill in equity, especially where they amount to legal fraud. Courts of law relieve negatively against frauds. 6 *H. & J.*, 255, *Lamborn vs. Watson.* Therefore we use the following decisions: 1 *H. & J.*, 361, *Goldsmith vs. Tilly.* 3 *Gill*, 49, *Bullitt vs. Musgrave.* 9 *Gill*, 175, *State vs. Williams.* 6 *H. & J.*, 95, *Hewitt vs. The State.* Mistake of fact will vitiate the award where the fact appears on the face of the award and the mistake appears *aliunde* by evidence. 59 *Law Lib.*, 164. 2 *Story's Eq.*, *sec.* 14. 2 *Vernon*, 705, *Corneforth vs. Geer.* 5 *Sergt. & Rawle*, 51, *Large vs. Passmore.* 4 *Dallas*, 284, *Williams vs. Paschall.* 1 *H. & J.*, 361. 2 *H. & McH.*, 478, *Oliver vs. Heap. Kyd on Awards*, 327. 3 *H. & McH.*, 118, *Til-*

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lard vs. Fisher. But here is a mistake in law apparent on the face of the award as based on the facts assumed. The meeting at which the award was made and agreed upon is as essential as any other meeting, and no *notice* of that is proved. *Caldwell on Arbitrations*, 206. 6 *H. & J.*, 406, *Rigden vs. Martin.* *Watson on Awards*, 73. 3 *Gill*, 49. Notice is always necessary or the award is void. 3 *Gill*, 49. 7 *Gill*, 497, *Emery vs. Owings.* Again, the conduct of the arbitrators in receiving the affidavit of Carson touching the contract vacates the award. (63 *Law Lib.*, 172, 173, 177. 1 *Dallas*, 161, *Hollingsworth vs. Leiper.* *Ibid.*, 187, *Chaplin vs. Kirwan.* 6 *Ves.*, 70, *Walker vs. Frobisher.* 9 *Do.*, 67, *Fetherstone vs. Cooper.* *Watson on Awards*, 170. 8 *Taunt.*, 694. *In re, Hick et al.* 4 *Dallas*, 232, *Falconer vs. Montgomery.* 2 *Halst.*, 428, *Harker vs. Hough*,) although they swear it had no influence. 63 *Law Lib.*, 175, 176.

Henry P. Brooks and *Levin Gale* for the appellee, stated, that the decisions of the court below in the first two exceptions need not be discussed, because even if wrong they are not causes for reversal as the appellant has received *no harm* thereby. They then argued:

1st. That the award offered in evidence in this case not being submitted by rule of court, in pursuance of the acts of Assembly relating to submission of causes pending in courts, the same cannot be inquired into or set aside in this case, unless there is *obvious mistake apparent on the face of the award*, and that there is no such mistake and therefore all the prayers offered by the plaintiff were properly rejected. The mistake that will vitiate an award must be a plain and obvious one *upon its face*, and not a mistake in the *judgment* of the *arbitrators.* It has always been the law, that nothing *dehors* the award can be given in evidence to defeat it. 2 *Story's Eq., sec.* 1452. 63 *Law Lib.*, 434. 51 *Do.*, 107. 59 *Do.*, 155. 3 *Johns.*, 368, *Barlow vs. Todd.* 2 *Do.*, 62, *Newland vs. Douglass.* 3 *Monroe*, 439, *Southard vs. Steele.* 18 *Ala.*, 174, *Strong vs. Beroujon.* 5 *Halst.*, 7, *Shuland vs. Wood.* 13 *New Hamp.*, 72, *Rand vs. Reddington.* 11

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Missouri, 624, *Finley vs. Finley*. 13 *Ill.*, 454, *Pottle vs. McWorter*. 13 *Verm.*, 484, *Emerson vs. Udall*. 1 *Hill*, 319, *Dater vs. Wellington*. 6 *H. & J.*, 13, *Cromwell vs. Owings*. 9 *Gill*, 172, *State vs. Williams*.

2nd. The plaintiff's second prayer was properly rejected. For even if the award can be inquired into it was immaterial whether the plaintiff was present or not at the meeting at which the award was made, written and subscribed, the arbitrators having the undoubted right to make up their opinion and sign the award in the absence of the parties. Indeed it is difficult to understand how they could consult and decide properly in the presence of the parties. This prayer is confined exclusively to the meeting at which the award was made up and signed, and no other question in regard to *notice* can be raised in this court as none other was presented below. The authorities all say that notice of the *publication* of an award is not *necessary*. 63 *Law. Lib.*, 436. 59 *Do.*, 89.

3rd. The third prayer was properly rejected. For even if the award can be inquired into, the fact that defendant submitted his affidavit to the arbitrators in reference to a matter in dispute does not vitiate the award as it did not affect their decision. 1st. Notice was given to the plaintiff before the award was made, and he did not object nor withdraw his submission, which he could then have done. He should not be allowed to wait until he ascertained which way the award was made, and object only in the event of the award being against him. 21 *Eng. C. L. Rep.*, 371, *Matson vs. Trower*. 12 *Penn. State Rep.*, 134, *Graham vs. Graham*. 4 *Term Rep.*, 589, *Hall vs. Lawrence*. 40 *Eng. C. L. Rep.*, 648, *Bignall vs. Gale*. 63 *Law. Lib.*, 175. 6 *Ves.* 72, *Walker vs. Frobisher*. 4 *Dallas*, 271, *Passmore vs. Pettit*. 2nd. The plaintiff was guilty of the first fault, if it was a fault, by submitting his own statement or letter to the arbitrators. 9 *Ves.*, 67, *Fetherstone vs. Cooper*. 3rd. The prayer itself assumes that no influence was had on the judgment of the arbitrators by the affidavit, and if so no wrong was done by it. This is a different question from the question whether you can inquire whether it had any effect. For although it might be

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true that the court, on principles of policy, would not enquire whether a matter, which was improper, had or had not any effect on the judgment of the arbitrators, yet if the plaintiff choses to assume in his prayer that it had no effect he cannot be permitted to ask a reversal for a matter which was entirely barren of results. 6 *Ves.*, 72. 9 *Gill*, 61, *Ramsay vs. Glass.*

4th. The fourth prayer was properly rejected, because there was no mistake of fact made by the arbitrators. It is also erroneous in this, that it submits to the jury the question, whether the arbitrators were mistaken in any of the facts set out on the award, whereas to vitiate the award the *mistake must appear on the face of the award and must be a self-evident mistake, such as a miscalculation or the like;* or it must be admitted by the arbitrators, that they had made a mistake, and that but for that mistake they would have determined otherwise. *The fact that the court or the jury do not agree with the arbitrators in their opinion, or think they were wrong in their conclusion, is not sufficient to vacate the award.* 51 *Law Lib.*, 46, 47. 63 *Do.*, 242 *to* 246. 6 *Metcalf*, 131, *Boston Water Power Co. vs. Gray.* 11 *How.*, 349. *Benchall vs. Marsh.* 2 *Gallison*, 69, *Kleine vs. Catara.* 6 *H. & J.*, 12, *Cromwell vs. Owings.* 5 *Md. Rep.*, 361, *Ebert vs. Ebert.*

5th. The fifth prayer was properly rejected. The assumption that the award held the defendant exempted from liability alone or entirely, on the ground mentioned in this prayer, is not true in fact, the award not professing to set out all the grounds for the decision given. Even if true it is not erroneous in point of law and not inquirable into. An error of law to vacate an award, if it can be vacated at all for such cause, must be a plain and obvious mistake on a point of law, unmixed with facts, and where no equitable considerations could enter into the subject to be decided. 2 *Gallison*, 69, *Kleine vs. Catara.* 25 *Verm.*, 316, *Spaulding vs. Warren.*

6th. There is no evidence to support the facts assumed in the sixth prayer, and if there was, our argument, on the preceding prayers, shows that this one also was erroneous. Again, it assumes facts which should have been left to the jury. It

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assumes fraud without submitting the question to the jury, or hypothetically assuming any facts to base the objection of fraud upon.

Orville Horwitz for the appellant in reply, argued:

1st. As to the right to inquire into the validity of the award *in this way*, there is a distinction between references under rule of court and submissions out of court. 1st. In cases of references the award returned to court must be set aside on motion when every defence or objection avails that would avail in equity. In 1 *H. & J.*, 364, *Goldsmith vs. Tilley*, the court say: "Every ground of relief in equity against an award is equally open in this court." 2nd. In actions brought on awards or on bonds for submission, or where the award is introduced as a defence there the practice in Maryland is to hear the objections at law. 2 *H. & McH.*, 478, *Oliver vs. Heap*. 3 *H. & J.*, 383, *Walsh vs. Gilmor*. If, when declared on, they can be resisted, *a fortiori* can they *when offered as a defence?* Suppose the award in this case had been *pleaded*, could we not have assailed it?

2nd. How are awards to be considered? They ought not to be held more sacred than the verdicts of juries. 1 *Dallas*, 315, *Williams vs. Craig*. There are two grounds for setting aside an award; either matter *apparent* on the face or matter *dehors*. 1st. *As to matter apparent on the face.* What will suffice? *Mistake of fact apparent on the face.* 1 *H. & J.*, 364. 9 *Gill*, 175, *State vs. Williams*. The conclusion that "*the wall* had not been *well built*," is a wrong conclusion of fact. The defect might have arisen from any *other source*. *Mistake of law* will also suffice to vacate the award. The obligation of the contractor is to make the *foundation sufficient*, and not merely to pay attention to the building during its progress. As to duties of agent see *Paley on Agency* in 28 *Law Lib.*, 5, 10, 76, 78. 14 *Mass.*, 282, *Taft vs. Inhabitants of Montague*. 2 *Car. & Pay.*, 378, *Moneypenny vs. Hartland, et al.* He must not rely upon another's information, but must *look for himself*. 1 *Car. & Pay.*, 352, *Moneypenny vs. Hartland, et al.* 3 *Starkie's Rep.*, 6 *Duncan vs. Blundell.*

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So that the *implication* of *law would be* that he should see that the foundation *was sufficient*. But the contract *expressly provided for the taking down* of the south gable-end wall and made it his duty to supply its place. The *award proceeds* upon the double error of law; that if he made a *mistake* in his judgment he was relieved; and again, upon the idea that the duty was to superintend diligently. If it appears on the face of the award that there is evidence *not pertinent or legal* relied on by the arbitrators, it will be set aside. *Peck, (Tenn. Rep.,)* 275. 2nd. *As to matters dehors.* Want of notice of last meeting is fatal, for Roloson was thereby deprived of the opportunity of examining McCoy. 1 *H. & J.*, 362, *Selby vs. Gibson.* 6 *H. & J.*, 406, *Rigden vs. Martin.* 3 *Gill*, 49. *Bullitt vs. Musgrave.* 63 *Law Lib.*, 172. The *reading of an ex-parte affidavit by the arbitrators* vitiates the award. 4 *Dallas*, 272, *Passmore vs. Pettit.* 1 *Dallas*, 161, *Hollingsworth vs. Leiper.* 7 *Gill*, 498, *Emery vs. Owings.* 63 *Law Lib.*, 173, 174, 176. If the contract has been *misconstrued*, it being in *writing*, the court will correct the error. 5 *Sergt. & Rawle*, 52, *Large vs. Passmore.* Again, the award does not cover the submission, but only decides *part* of the matter in controversy, and for this reason is defective. 5 *G. & J.*, 412, *Armstrong vs. Robinson.* 6 *H. & J.*, 10, *Cromwell vs. Owings.*

Eccleston, J., delivered the opinion of this court.

The questions of most importance in the cause are those which relate to the award, we therefore intend directing our attention to them first; although they are presented by the plaintiff's prayers, numbered from two to six, inclusive, which are to be found in the third and last bill of exceptions.

In England, when an award made under a reference *in pais* is sued upon, or is used in defence, in a court of law, it cannot be impeached for matters *dehors* the award. And when the injured party wishes to relieve himself from such an instrument, by proof *aliunde*, he must file a bill in equity to set it aside. In the suit at law he is confined to errors apparent on the face of the award. Not only is it so in England, but like-

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wise in many of the States of this Union, as will appear from the authorities referred to by the counsel for the appellee under their first point.

Portions of the plaintiff's evidence intended to impeach the validity of the award should have been rejected in the court below, if objected to as inadmissible, because *dehors* the award. But what those portions are need not now be inquired into; because, even considering the evidence as in the cause, still we think the prayers of the plaintiff were rightfully refused by the court. And this renders it unnecessary to ascertain to what extent, if any, the English rule in regard to the impeachment of awards, similar to the present, has been altered or modified in Maryland.

The award in controversy is in the following language: "The undersigned, Samuel Harris and J. Nant, having been appointed arbitrators by Frederick Roloson of the one part, and David Carson, contractor, of the other part, both of the city of Baltimore, to settle a matter of difference between them respecting the building of an addition to said F. Roloson's warehouse, situate on the west side of N. Paca, between Fayette and Lexington streets, which building or addition to said house, when near being finished and taken possession of by said Roloson, fell down in part, from the fact that the old stone wall which was to remain, and which wall was supposed by all parties to be good and sufficient to support all the weight for which it was intended, gave way or crushed under the iron columns, which caused the damage, showing very plainly that the wall had not been well built. The arbitrators named above, at their second meeting, called in James Curley, and after hearing all the statements of both parties respecting the cause, &c., also examined, under oath, five witnesses called by Mr. Roloson, some of whom had worked upon the building, and others frequently saw the work while in progress; and all of the five witnesses testified that said Carson had paid proper attention to the work from first to last. We therefore, as arbitrators, say, after hearing all the evidence produced in the case, and from our own observation, after a careful examination of the building, that D. Carson is not in any way in fault

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and not liable for any part of the damage, it being one of those things which human wisdom could not foresee.

SAMUEL HARRIS,
JOHN NANT,
JAMES CURLEY."

From this we understand the arbitrators as intending to say, in effect, that the wall which fell was to remain, and was supposed by all parties to be good and sufficient to support all the weight for which it was intended; that the external appearance of it indicated no unsoundness or imperfection, but by the fall the internal defectiveness of the structure became manifest, although previously concealed from human observation; that the damage resulted from such concealed defect which caused the falling of the wall; and as that wall, by agreement, was not to be taken down, but to stand as it was, the arbitrators came to the conclusion that Carson was not in fault and not liable for the damage.

Whether the old wall, by contract, was to stand, and whether its external appearance exhibited such a state of soundness as to indicate its entire sufficiency to sustain the weight designed to be placed upon it, disclosing no evidence of any internal defect whatever, the parties supposing it good and sufficient for what it was intended; and whether the falling of the wall was caused by its concealed defect, and not a want of proper care or skill, in the manner of placing the iron columns upon it, were matters in regard to which the conclusions of the arbitrators were formed from the evidence, in connection with their own personal observation. From the nature and character of the circumstances presented for consideration and decision by the referees, if they committed errors or mistakes in their conclusions upon the facts, they were mere errors of judgment, and not gross mistakes which could defeat the award. It is not every error or mistake which can avail for such a purpose. On the contrary, by a long course of decisions, courts have manifested a strong inclination to sustain the judgments pronounced by arbitrators. Mistakes committed by them in drawing incorrect inferences, or forming erroneous judgments or conclusions, from facts, will not vitiate their

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awards; but when mistakes are relied upon for that purpose they must be gross and manifest. In *Knox vs. Symmonds*, 1 *Ves., Jr.*, 369, where the court, from the character of the proceeding, were at liberty to look, not only to the award, but also to the evidence *aliunde*, Lord Thurlow says: "To induce the court to interfere there must be something more than an error of judgment, such as corruption in the arbitrators, or gross mistake, either apparent on the face of the award or to be made out by evidence; but in case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened he should have made a different award." This remark is quoted with approbation in *Burchell vs. Marsh, et al.*, 17 *How.*, 344. And in that case the Supreme Court also say: "Courts should be careful to avoid a wrong use of the word 'mistake,' and by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards."

From its peculiar applicability to the subject before us we are induced to make a quotation from the opinion of Ch. Justice Shaw, in *Boston Water Power Co. vs. Gray*, 6 *Metcalf*, 181, where he says: "The mistake or accident, therefore, must be of some fact which deceived and misled the arbitrators, and not a mistake in drawing conclusions of fact from evidence or observation." That mistakes which are but errors of judgment will not invalidate awards, may be seen by reference to *Cromwell vs. Owings*, 6 *H. & J.*, 10, and *Ebert's Exc'rs vs. Ebert's Adm'rs*, 5 *Md. Rep.*, 353. And in delivering the opinion of the court in *Goldsmith vs. Tilly*, 1 *H. & J.*, 364, Ch. J. Chase says: "The court will not unravel the matter and examine into the *justice* and *reasonableness* of what is awarded."

Without meaning to say whether we should have drawn the conclusions which the referees did, we feel no hesitation in saying, that after looking, not only to the award, but also to the proof in the cause, we see no just reason for supposing they did not believe they were doing what justice demanded of them. And in *Burchell vs. Marsh, et al.*, where the award was open to a full examination, under a bill in equity, filed

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for the purpose of setting it aside, the court use this language: "If the award is within the submission and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either of law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation."

The plaintiff's second prayer, but the first stated in the record, is: "If the jury find from the evidence that the award read in evidence was made, written and subscribed by the arbitrators, at a meeting at which plaintiff did not attend and of which no notice was given to him, the plaintiff, then the said award is no bar to a recovery in this case, unless the jury are further satisfied from the evidence that the said award, after being notified to the plaintiff, was acquiesced in and assented to by him."

If the law of this prayer is correct, then an award is void, unless ratified after notice of it is given, provided the party opposed to it is not present at, or notified of, the final meeting of the arbitrators, held simply for the purpose of making their decision, writing out and signing their award, although they may have previously heard all the allegations of the parties and examined all the evidence. When jurors retire to their chamber for the purpose of forming a verdict the parties are excluded, so that there may be a free and unbiassed deliberation as to what the verdict ought to be. Why have not arbitrators the same privilege of secret consultation and interchange of views, in regard to their final decision of the matters submitted to them? Impartial justice requires it should be so. If then arbitrators must be allowed the privilege of consultation, in private, for the purpose of making their award, what possible benefit can result from requiring the parties to have notice or knowledge of such an intended meeting? Not considering it necessary the parties should have notice of, or be present at, a meeting of that description, we think the court did right in refusing the prayer.

The third prayer assumes the award to be void in conse-

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quence of the arbitrators having read the defendant's affidavit without previous notice to the plaintiff, and in his absence, even if the jury believed the affidavit had *no influence* on the minds of the arbitrators. The prayer is in the alternative, "although the jury may believe that the said affidavit had little or no influence on the minds of the arbitrators," and therefore if the instruction had been given the jury would have been justified in deciding against the award, on account of the affidavit being read, although they believed it produced *no effect* upon the decision of the referees. That would be allowing an award to be defeated for what is known to have exerted neither beneficial nor injurious influence on the rights of either party. Whilst it might be very proper to set aside an award because the arbitrators had read an *ex-parte* affidavit of this sort, and a court would not consider such an objection to the award as removed, even were the arbitrators to testify that the affidavit had no influence on their decision, still such a principle does not sanction the propriety of a prayer which assumes that the affidavit had no effect upon the award. Such a proposition would be equivalent to saying the mere reading of such a paper will defeat an award, although the parties have agreed that it produced no possible effect.

The proposition stated in the fourth prayer is, that if the jury should find from the evidence the arbitrators were mistaken in the facts, or any of them, recited in the award, as the grounds on which they so awarded, and that without such *mistake* they would not have so decided, then the award is no bar to the plaintiff's claim. After a full consideration of the evidence we see no proof on which such a prayer could be granted: no evidence, in our opinion, legally tending to prove such a gross palpable error or mistake, in any of the facts recited by the arbitrators, as the grounds on which they made their decision, which could defeat the award. If the evidence has any tendency to show mistake, it can amount to nothing more than mistake or error of judgment on the part of the arbitrators, in drawing conclusions or inferences from the evidence and their own observation.

The fifth prayer is: "That the award read in evidence

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undertakes to acquit and exonerate the defendant from liability on the ground *alone*, as stated therein, that both parties supposed the stone wall to be good and sufficient, and the same proved defective, which was the cause of the falling of the building, and the award is therefore void for mistake in law, of the arbitrators, appearing on the face of their award, in this, that the facts stated in the award do not, in law, warrant the conclusion, as the arbitrators supposed they did, that the defendant is free from liability to the plaintiff." In the very commencement of this prayer there is an error. Instead of the award undertaking to acquit and exonerate the defendant from liability, on the ground *alone*, that both parties supposed the wall good and sufficient, and the same proved defective, which caused the falling of the building, the award contains the important statement, that the wall referred to in the prayer "was to remain." Not that the arbitrators thought it was to remain, because both parties supposed it good; but after speaking of the new building, they say, it "fell down, in part, from the fact, that the old stone wall which was to remain, and which wall was supposed by all parties to be good and sufficient to support all the weight for which it was intended, gave way or crushed under the iron columns, which caused the damage." Here it is first said *the wall was to remain*, then follows the statement of the further fact that the wall was supposed by all parties, &c. Moreover, when in conclusion the arbitrators speak of their own observation or examination of the building, and of having heard all the evidence produced in the case, and say "that D. Carson is not in fault and not liable for any part of the damage, it being one of those things which human wisdom could not foresee," it is evident the award does not undertake to exonerate and acquit the defendant from liability, on the ground *alone* stated in the prayer. Of course it should not have been granted.

By the sixth prayer the court were asked to instruct the jury, "that the paper offered in evidence and purporting to be an award is void for the following reasons:

1st. Because there is a mistake of fact apparent on its face.

2nd. Because there is a mistake of law apparent on its face.

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3rd. Because of the improper conduct of the arbitrators.

4th. Because it is not in accordance with the submission as proved by Mr. Harris."

The first reason confines the court to the award itself; and if there is any mistake of fact on its face, we cannot see any which can be considered more than an erroneous judgment or inference. The second reason assumes there is a mistake of law apparent on the face of the award. Whether the court could so instruct the jury must be ascertained by looking to the award itself, without resorting to extrinsic evidence for the purpose of showing a mistake, the assumption being that on its face the award shows it.

We have already stated what we understand to be the meaning of the award in regard to the grounds on which the arbitrators exonerated the defendant from liability, and we think that conclusion upon those grounds was not an error or mistake in law, authorizing the court to instruct the jury that the award is void, because on its face there is an apparent mistake of law. In *Ebert's Exc'rs vs. Ebert's Adm'rs*, it is said: "A more liberal and reasonable interpretation of awards is now adopted by the courts than formerly existed, as to awards. Every reasonable intendment will be made in their favor, and a construction given to them that will support them, if possible, without violating the rules adopted for the construction of instruments." In support of this reference is made to *Caton vs. McTavish*, 10 *G. & J.*, 193. 11 *Law Lib.*, 53, 61, 63.

The third reason relies upon the ground of improper conduct in the arbitrators. The award furnishes no proof of such misconduct, and if any existed it could only have been shown by the evidence. The prayer did not ask the court to inform the jury what facts were sufficient to establish misconduct, leaving the jury to decide whether such facts had been proved; but the court were called upon to say the award was void because of the improper conduct of the arbitration. The granting of such an instruction would have violated the right of the jury to decide questions of fact. In the fourth reason the plaintiff assumed the award to be void, because it was not in accord-

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ance with the submission as proved by Mr. Harris. The testimony of this witness was not the only proof in regard to the terms of the submission. Mr. Nant also testified on that subject, and therefore the court were right in refusing to say the award was void because it was not in accordance with the submission as proved by Mr. Harris.

Believing, as we do, the award to have been a good defence against the plaintiff's claim, and that even if the other decisions of the court below, to which exceptions were taken, are erroneous, the case ought not to be sent back under a *procedendo*, it is unnecessary to inquire whether those decisions are correct or not. Indeed we understood the counsel on both sides as agreeing that if the judgment was not reversed upon the plaintiff's prayers in regard to the award, the other questions presented by the record were of no importance so far as this case is concerned. They desired the court, however, to express an opinion upon the question raised by the second bill of exceptions, in regard to the refusal of the court to suspend the examination of the witnesses until the plaintiff's counsel had finished writing his exception.

The act of 1834, ch. 233, sec. 11, provides that bills of exceptions must be signed before the verdict is rendered, if the party requires it. Under this act the court has a discretion as to what time the exceptions shall be either prepared or signed, provided they are completed prior to the verdict; and consequently the action of the court in this instance, in regard to directing the cause to be proceeded in, by the examination of witnesses, against the objection of the plaintiff's counsel, who was writing the exception, we think is not subject to revision on appeal. We will, however, say, that in our opinion, as a general rule, the most appropriate time for, and most likely to avoid delay in, preparing an exception, is, immediately after the decision which is to be excepted to, when the facts are fresh in the recollection of court and counsel, and the witnesses are in attendance, affording an opportunity of re-examination, if a controversy should arise in reference to any portion of the testimony.

Judgment affirmed.

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Ex-Parte Hugh O'Neill.

The Court of Appeals has *appellate* jurisdiction only, and as jurisdiction in a case of *habeas corpus* is *original* and not appellate in its character, this court cannot exercise it.

But the individual judges of the court may, under the act of 1809, ch. 125, whether the court be in session or not, grant the writ of *habeas corpus during the vacation of the circuit courts.*

The acts of Assembly imposing duties upon the judges of the Court of Appeals in their *individual capacities* have not been abrogated by the new constitution, but apply in the same manner to the members of the present as to those of the former court.

The power to hear and decide upon cases of *habeas corpus* may be claimed by the individual judges of the Court of Appeals, under that clause of the constitution which makes them "conservators of the peace throughout the State."

The term "*vacation*," in the act of 1809, ch. 125, refers only to the county courts and not to the Court of Appeals.

This was an application made to the Court of Appeals, during its session in term time, for a writ of *habeas corpus*, made by the petitioner, O'Neill, through his counsel, *James S. Franklin*, alleging that he was unjustly confined in the jail of Anne Arundel county, upon the charge of shooting a free negro with intent to kill.

Mason, J., delivered the opinion of the court upon this application.

We cannot discover from the new constitution any purpose to abrogate any of the acts of Assembly imposing duties upon the members of the Court of Appeals in their individual capacities; but on the contrary, we are of opinion, that the members of the new Court of Appeals accepted their offices, burthened with the obligation to discharge the duties which were imposed by those acts upon the judges of the former court. Under this impression all the members of this court have acted in their attendance upon, and participation in the proceedings of the board of Governors and Visitors of St. John's College, and under which others have acted in taking acknowledgments of deeds, in hearing cases in *habeas corpus* and the like. It is evident that the new constitution designed that the present

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Court of Appeals, as well as the individual members thereof, should, for every purpose, unless otherwise specified, be substituted to all the powers, duties and responsibilities of the former court, and its individual members.

The act of 1809, ch. 125, empowering any judge of the Court of Appeals, in vacation, to grant the writ of *habeas corpus*, is still in force and applies to the present members of the Court of Appeals. The reason why the power under that act was only to be exercised during vacation was, manifestly, because during the sessions of the court there would be no necessity for the judges to exercise the power, inasmuch as the court possessed the same power, and being in actual session could exercise it, and thus grant immediate relief to the aggrieved party.

The judge who pronounced the opinion in the case of *Walsh*, 5 *Md. Rep.*, 607, (the same who delivers the opinion of the court in this case,) fell into the error of supposing, that the *vacation* referred to in the act of 1809 embraced as well the vacations of the Court of Appeals as those of the county courts. Mature reflection brings us to the conclusion, that the term, *vacation*, refers only to the county, now circuit, courts, and the courts of Baltimore, to which have been transferred the powers and duties of the former county court. It does not appear to us that the Court of Appeals ever had original jurisdiction in cases of *habeas corpus*, (*Norwood vs. Martin*, 3 *H. & J.*, 199,) and therefore there is no more reason why this power should be only exercised during the vacation than during the actual sessions of that court. The reason why this power was conferred upon judges in their individual capacities only, *in vacation*, was to provide against the delay which parties would be subjected to if they should have been required to wait for relief until the court having jurisdiction in their case should hold a session; and if the Court of Appeals had no jurisdiction, the same reason would apply why the power should be exercised by a single judge as well during the session as during the vacation of that court. The great design of the law of 1809 was to require the judges therein named to grant the writ of *habeas corpus* wherever they might be, within the limits of Maryland,

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provided at the time the county court of the county where the application was made was not in session, to which the injured party could appeal. The design and efficacy of this law have not been impaired by the new constitution; but on the contrary, the powers and duties imposed under it have been transferred to the judges created under the new, which correspond to those designated in the old constitution.

A power so valuable to the peace and liberties of our citizens as that conferred by the act of 1809 ought not to be considered as abrogated or withdrawn by the new constitution, except upon the plainest and most unequivocal language. We have not been able to discover such a purpose upon the face of this constitution.

The new constitution, while it continues the powers in the individual members of the court as defined by the act of 1809, nevertheless evidently designed to withhold it from the court itself. The 4th article, section 1 of the constitution expressly provides, that "the Court of Appeals shall have *appellate* jurisdiction only," and as jurisdiction in a case of *habeas corpus* is original and not appellate in its character, it cannot be claimed by this court.

Nor can we see any inconsistency in this distinction, nor would any inconvenience result from it. The opinion of an individual judge of this court, expressed in a case of *habeas corpus*, upon a summary proceeding, might well afterwards be reviewed, if properly the subject of appeal, by his three associates, or even in part by himself, when upon full hearing and argument the merits of the question would be more fully developed. This court then has no original jurisdiction in cases of *habeas corpus*.

We are further of the opinion, that the power to hear and decide upon cases of *habeas corpus* may be claimed by the individual judges of this court, under the 4th article and 6th section of the constitution, which provides, that "all judges of the Court of Appeals, &c., shall, by virtue of their offices, be conservators of the peace throughout the State." Every case of unlawful imprisonment may be said to present a question connected with or affecting the peace of the community, and as

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conservators of the peace, it is our duty to examine into all such cases when properly and upon sufficient grounds they may be presented to us; and if necessary to do so effectually, we may command the aid of the writ of *habeas corpus*.

Petition dismissed.

NOTE.—The writ was afterwards issued by one of the judges of the court, and the case was heard before *Justice Tuck*, who released the party upon bail.

WM. W. MCCLELLAN and Wife, *vs.* JOHN P. KENNEDY, JOHN GLENN and others.

The *compromise of a suit* to vacate a deed *advisedly made*, by which the grantor agreed to take back her property and also all that of the grantee, and to pay certain specified debts of the grantee, is a sufficient consideration to support her assumption of such debts, and the court will not look to the circumstances affecting the original suit.

Compromises, if otherwise unobjectionable, are binding, and the *right* will not prevail against the agreement of the parties.

Under the acts of 1829, ch. 216, and 1831, ch. 305, it is competent for a female eighteen years of age to execute a release to a party who *had been* her guardian, but had been removed and a new one appointed in his place, and for such party to *receive* such release.

In such case, the second guardianship had terminated by the arrival of the ward at the age of eighteen, and the second guardian had no power to receive and pass acquittances for the ward's property in the hands of the first guardian.

Settlements between guardian and ward, made recently after the office has terminated, are not favored, because the influence may be supposed still to continue; but this fact alone is not a fatal objection to a release executed by a ward.

A release after majority, based on information acquired before that time, will be upheld in equity if not otherwise objectionable.

But promises to execute a release, made by a ward when she was a mere child, are not binding upon her, and can have no effect in sustaining a release executed when she attained majority.

Admissions acted on by others, whether true or false, are conclusive against the party making them, in all cases between him and the party whose conduct he has thus influenced.

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A release by a daughter eighteen years of age to her father, as guardian, but whose guardianship had ceased nine years before, made to repair wrongs done by the father to her half-sister, there being no proof of concealment, or of undue control or influence by the father over the mind of the daughter at that particular time, though gratuitous, is valid in favor of third parties who have acted upon the faith of its validity.

The record of a suit against a former guardian *alone*, to vacate a release executed to him by his former ward, resulting in a decree annulling the release, is not evidence in a subsequent suit against persons not made parties to the former suit, though interested in sustaining the release.

As a general rule, judgments and decrees cannot be used as evidence in other suits against persons who were not parties to them; but to this rule there are exceptions.

Where there is no proof of the law of another State in regard to the construction of a will executed in that State, it must be construed by the law of this State.

APPEAL from the Court of Chancery.

The record in this case is very voluminous, but the following brief statement of the material facts, together with the report of the opinion of the chancellor, in 3 *Md. Ch. Dec.*, 234, will sufficiently explain the decision of this court:

Richard Bennet Mitchell, about the year 1809, married Mrs. Elizabeth Bedford, the daughter of Daniel Deady, Esq., then a widow and the mother of Henrietta A. Bedford. By this marriage Mitchell had two daughters, Elizabeth and Maria, the latter of whom was born on the 9th of March 1816, and both being entitled to a large property as heirs at law of their grandfather, the said Daniel Deady, their father, Mitchell, was appointed their guardian. Mrs. Mitchell, their mother, died in 1816. On the 26th of February 1825, Mitchell *married his step-daughter* and ward, Henrietta A. Bedford, she at that time owning and being possessed of a large estate, real and personal; and on the 23rd of March following, for the nominal consideration of five dollars, she conveyed *all her property of every description* to Mitchell. In this deed she is described as "Henrietta A. Mitchell, otherwise called Henrietta A. Bedford," and acknowledges it as a *feme sole*. On the day following, another deed was executed by Mitchell and the said Henrietta, *as his wife*, and acknowledged by her as a *feme covert*, conveying the same property for the same consideration

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to Thomas H. Wright, who, on the day following, (25th of March 1825,) reconveyed the same for a like consideration to Mitchell. Shortly after the execution of these deeds, the said Henrietta, (or Mrs. Bedford, as she is called in the proceedings,) became aware that her marriage *was illegal*, and her friends becoming cognizant of it and having interfered in her behalf, she left Mitchell, who, in the same year, was indicted and afterwards convicted of the illegal marriage.

Prior to his conviction, viz., on the 25th of August 1825, Mitchell conveyed all his property, including that acquired as before stated from Mrs. Bedford, to Kennedy and Glenn, *in trust*, to pay what he *might then or thereafter owe to his daughters, Elizabeth and Maria, as their guardian*, and the residue *in trust* for himself, and under this deed, the trustees, in execution of the trust, sold a portion of the property *not derived* through Mrs. Bedford. On the 16th of April 1826, Mrs. Bedford instituted proceedings, in equity, against Mitchell, Wright, Kennedy and Glenn, to vacate the deeds of March and August 1825 and recover her property. Kennedy and Glenn becoming aware of the wrong done, and being satisfied that the deeds would and ought to be vacated, an arrangement, by way of compromise, was entered into between all the parties interested, in pursuance of which Mitchell united with Kennedy and Glenn in a deed, dated the 2nd of August 1827, conveying to Mrs. Bedford all the property they had received under the deed of the 25th of August 1825, she agreeing, as recited in the deed, "to pay and satisfy all the debts due by Mitchell, *and intended to be secured and paid by and from the trust fund created by the deed of August* 1825, and also to indemnify Kennedy and Glenn for all responsibility and engagements incurred by them on account of said trust." Mrs. Bedford accordingly, on the 18th of October 1827, gave a bond of indemnity to Kennedy and Glenn, with John Hillen as surety, to indemnify them against certain debts of Mitchell set out in a schedule annexed to the bond, *and from all loss on account of any debt that might be due from Mitchell to his daughter Maria*. And on the same day she conveyed all her property to Hillen, *in trust*, to carry out her part of the agree-

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ment by paying *said debts*, and to indemnify Hillen for his suretyship on her bond, and the suit was, on the 3rd of January 1828, entered "*agreed.*"

There is proof in the record to show, that whilst this arrangement was in progress, its nature, purpose and object were explained to the daughters, Elizabeth and Maria, then children, but intelligent and capable of appreciating the subject, and that they were willing to release all their claims against their father, as guardian, and expressed their determination to *execute releases* to him as soon as they attained the legal age to do so. Prior to this, *viz.*, on the 29th of June 1825, Mitchell's guardianship to these daughters was revoked by the orphans court, and on the 2nd of July following, Hillen was appointed guardian in his place. On the 17th of November 1827, Elizabeth, being then eighteen years of age, *executed a release* in due form of law to her father, as guardian, in which she admits she had received from him the balance due her by his last account, and no further claim on account thereof was ever made by her during her life, nor by her executor since her death. On the 12th of March 1834, a *similar release was executed* by Maria, she also being then eighteen years of age, (having attained that age on the 9th of the same month and year,) in which she admits that she had received from her father, as her guardian, the sum of $14,891.14, the amount due her by his account *of that date* passed with the orphans court. Both these releases were under seal, acknowledged before a justice of the peace and recorded in the orphans court.

In the mean time, Hillen paid all the debts mentioned in the schedule annexed to the bond of indemnity out of the property conveyed to him by the deed of the 18th of October 1827, and on the 2nd of April 1834, conveyed back to Mrs. Bedford what property remained in his hands discharged from all trusts whatever, and this conveyance she accepted as a final settlement of Hillen's trust.

Subsequently, on the 11th of December 1837, Maria Mitchell married Wm. W. McClellan, who, with his wife, in May 1838, filed a bill in equity against Richard Bennett Mitchell, the object of which, among other things, was to vacate and set

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aside the release executed by the said Maria, on the 12th of March 1834, upon the ground that it was without consideration, and was obtained by the undue and despotic influence of Mitchell over his said daughter and ward. The result of this proceeding was a decree, passed on the 31st of July 1840, *vacating the release*. But this bill made no reference to the deeds mentioned above, and no one was made defendant thereto except said *Mitchell alone*. The record also shows, that the same parties also instituted suit upon Mitchell's guardian's bond, in which suit this release was relied upon and a verdict rendered in favor of the defendants, upon which a judgment of *non pros.* was entered on the 14th of October 1844.

The release having thus been set aside, McClellan and wife, on the 15th of December 1841, filed the *present bill* in chancery against Mrs. Bedford, Mitchell, Kennedy, Glenn, the executors of Hillen and of Elizabeth Mitchell, the object of which is to make the property conveyed to Kennedy and Glenn by the deed of the 25th of August 1825 responsible for the debt due by Mitchell to his daughter Maria, the wife of the complainant, McClellan. The allegations of this bill and the answers thereto, and the testimony then taken in the case, are sufficiently stated in the report of the chancellor's opinion, in 3 *Md. Ch. Dec.*, 234. Pending these proceedings, Mrs. Bedford died in the city of New York, leaving a will, by which she devised all her property to trustees, in trust for the use of her daughter during her natural life; and in case of her marriage, to pay the yearly income thereof to her husband during the marriage, and after her death, to hold the same for the use of the lawful heirs of her body till such heirs arrive at lawful age; and "if her said daughter should die without lawful issue," then the whole of her property to be left to her brother, Dr. Gunning S. Bedford, and his heirs. The testimony of this brother, which was taken in this case by agreement as if under an order of court, (he having been made, as the executor of Mrs. Bedford and one of the trustees named in her will for her daughter, a party to the suit,) was excepted to by the complainants upon the ground of interest under this will. The defendants also excepted to the admissibility in evidence of the record of the case

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of McClellan & wife, vs. Mitchell, in which the *release* was set aside, upon the ground that though parties in interest, they were not made parties to that suit.

On the 11th of January 1853, the chancellor delivered the opinion, which is reported in 3 *Md. Ch. Dec.*, 234, and in which he disposed of the case so far as the property which originally belonged to Mrs. Bedford was concerned, but it having been suggested in argument, that a portion of the property which had passed to her by the deed of the 2nd of August 1827, originally belonged to *Mitchell*, and that *this*, in any event, was responsible for complainants' claim, the chancellor reserved his opinion on this point and directed a commission to issue to take testimony thereon. Under this commission a large mass of proof was taken by both parties, the purport of which sufficiently appears from the following opinion of the chancellor, (JOHNSON,) delivered upon the 4th of February 1854, accompanying his decree dismissing the bill absolutely:

"In the opinion delivered by this court on the 11th of January 1853, but a single question was reserved, and that related to such property, if any, as Richard Bennet Mitchell may have owned, not derived from Henrietta A. Bedford. With reference to the estate which he acquired from her in the mode set out in the proceedings, my opinion was clear and decided, that the complainants had no title whatever to relief, and I was prepared at once to dismiss the bill.

"The proof taken since has produced no change in that opinion, and I shall therefore now confine myself to a very brief explanation of the reasons which satisfy me the complainants can have no relief, even with regard to the property which originally belonged to R. B. Mitchell and which was conveyed to Henrietta A. Bedford by the deed of the 2nd of August 1827.

"It is very certain that if the release of Mrs. McClellan is valid the complainants can have no relief of any kind or to any extent. The attempt which has been made since the last opinion was delivered, by the introduction of proof of Mitchell's tyrannical conduct towards, and influence over his

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daughter, Maria, (the present Mrs. McClellan,) to show that the release was improperly obtained, has, in my opinion, been unsuccessful. It appears to me to be very satisfactorily shown, that Mrs. McClellan executed this paper uninfluenced by any motives but such as would naturally and properly determine the conduct of one standing in the relation which she occupied towards a suffering party, upon whose property and prospects her father had perpetrated such an inexpiable wrong.

"It would be a useless waste of time to recapitulate the circumstances going to prove that she acted under the pressure of no undue influence in executing the release. They will be found in the report of the former case in 3 *Md. Ch. Dec.*, 234, and will, I am persuaded, notwithstanding the evidence subsequently introduced, conduct to the conclusion then arrived at, that in executing that instrument she was performing 'an advised, unbiased and voluntary act, wholly uninfluenced by her father or any one else.'

"It is not pretended that her sister, Elizabeth, who likewise released her father, was controlled by him, or that she was like Mrs. McClellan, the victim of his brutal disposition. Why then did Elizabeth release? Clearly, as I think, because it was the deliberate and settled purpose of these two sisters to make all the reparation in their power to one so cruelly wronged by their father; or if that was not their motive it was the result of a family arrangement, which, for reasons appealing powerfully to female susceptibilities, they never designed to disturb. It may be affirmed, I think, with entire confidence, that Mrs. McClellan would not have been disposed to re-open these transactions of her own accord, and bring them with their attendant painful and mortifying circumstances again to the public gaze.

"It is very certain, that during her single life, from March 1834 to her marriage with the complainant, William, in December 1837, she did nothing to call in question the validity of the release, I consider myself therefore warranted in saying, from all the facts disclosed in the record, that the release was her free and voluntary act, emanating from motives and founded upon considerations which recommend it to the favor of a court of equity.

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"Upon the former argument it was intimated that Mrs. Bedford, by means of the conveyances contained in the record, had acquired parcels of property which belonged originally to Richard B. Mitchell, and in view of the circumstances of the case, it occurred to me, that with regard to such property, (if any such should be shown,) the equities of the parties might entitle the complainants to relief. Proof upon this point has since been taken, and although it is shown that a part of the property conveyed by the deed of the 2nd of August 1827, to Mrs. Bedford, did originally belong to Richard B. Mitchell; it likewise appears, by what I regard as competent and admissible evidence, that she engaged to pay, and there has in fact been paid, out of her own estate, in discharge of debts due by Richard B. Mitchell, more than his property was worth. This being the case the complainants have no equity, even with regard to this property, to be relieved from the operation of the release. I consider the evidence of Mr. Scott, to whose competency as a witness no exception can be taken, as quite sufficient to establish the fact adverted to, and I am persuaded, notwithstanding the objections which have been interposed to the character of his proof, that it may be used defensively and in support of the *bona fides* of the entire transaction. *Clagett vs. Hall*, 9 *G. & J.*, 81.

"The proof of Mr. Kennedy is, I think, also admissible, though a party to the suit. He was examined under an order, and I am of opinion, that under the circumstances of the case, he could not, in any event, be made personally responsible for costs. He has acted in good faith throughout, and it would be inconsistent with the uniform course of the court to render a trustee, under such circumstances, responsible for costs.

"There is moreover another fact brought to light by the recent proof, which goes strongly in support of the defendants' case. I refer to the letter from the complainant, William W. McClellan to Mrs. Bedford, under date the 23rd of December 1840, proposing to purchase from her certain annuities, a part of which was originally owned by R. B. Mitchell. This letter is, in my judgment, a full recognition of her title, with knowledge of all the facts, including the decree of 1840, in

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which in a suit to which Mrs. Bedford or those claiming under her *were not parties*, the release had been set aside.

"The decree setting aside the release was passed in June 1840. It was upon a bill against Richard B. Mitchell only, and consequently cannot be used for any purpose against Mrs. Bedford and those claiming under her. Yet it is reasonable to presume, that the complainants who obtained would be disposed to attribute to it some degree of efficacy. It seems, however, the complainant, Mr. McClellan did not, at least that he did not then, suppose that it exposed to the claim he now sets up, the property which had been conveyed to Mrs. Bedford.

"Being then of opinion, upon all the proof in the cause, that the equity as well as the law of the case is with the defendants, I shall pass a decree dismissing the bill with costs."

From the decree so passed the complainants appealed.

The cause was argued before LE GRAND, C. J., TUCK and MASON, J.

Charles F. Mayer for the appellants, argued:

1st. If even the court may infer undue influence from the relations of Mitchell and Henrietta, necessarily vitiating her original conveyances to him, yet she *has renewed and made valid, by her subsequent acts when unrestrained and independent*, the claim of Mrs. McClellan against the whole estate of the trust to Kennedy and Glenn, and that charge against the estate is not now to be annulled, *and especially not by her, but her representatives*, upon antecedent objections thus *foregone by herself*.

2nd. The charge for Mrs. McClellan's claim is available at least against *all the estate of Mitchell himself* embraced in the trust and remaining unsold, and against Henrietta's for *the value of all that has been sold* of Mitchell's original property so embraced: and her selling her own original estate or his *to pay debts, not, as will be observed, provided for by the trust*, cannot be at Mrs. McClellan's expense, and cannot affect the scope and integrity of the trust charge for benefit of her claim if the charge have any validity at all.

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3rd. The orphans court accounts of Mitchell's guardianship are proof of his indebtment to his ward Maria. 2 *G. & J.*, 235, *Iglehart vs. The State.* 7 *Gill*, 367, *Richards & Wife, vs. Swan, et al.*

4th. The decree annulling the release *obtained* by Mitchell from Maria, is evidence against the *defensive testimony* of that release. 2 *G. & J.*, 235, *Iglehart vs. The State.* 12 *Wheat.*, 515, *Drummond vs. Prestman. Mitf. Pl.*, 160, 171. 1 *Greenlf. on Ev., secs.* 180, 181, 187, 189, 527, 527 *(a.)* The question in this case on this point is not one of *party* but of *privity.*

5th. If that decree has not that effect here, the testimony taken in this cause shows that the release could not have been and was not voluntarily given, and is void.

6th. The release is founded, and for any effect *depends* on the recital of payment as the only consideration for it, and no payment having, as confessed, been made, the releasing clause of the writing fails of all operation whatsoever. 1 *Story's Eq. secs.* 317 to 322. *Mitf. Pl.*, 261. 3 *G. & J.*, 103, *Fridge vs. The State.* 5 *Gill*, 29, *Forbes vs. Forbes. Acts of* 1829, *ch.* 216, *sec.* 7, and 1831, *ch.* 305, *secs.* 4 *and* 7. 5 *Md. Rep.*, 219, *Miller & Mayhew, vs. Williamson, et al.*

7th. The acts of Assembly above referred to, as to releases from wards of eighteen years of age, do not apply to the case of a person who, at a period immediately antecedent to the release, was not a guardian, but who at such period had in his place *another as guardian*, and which actual guardian *had vested in him the claim of the ward against the displaced guardian.*

8th. These acts of Assembly serve only to give a *prima facie* validity to such releases as this, and do not mean to dispense with the obligation upon the guardian to pay his ward, especially where a payment, as here, is made the avowed ground for the release, even if that objection be considered as complied with, *until the contrary is shown*, where the solemnities of the acts of Assembly are observed. At utmost the statute provisions only avail to absolve the guardian from the operation of the general principle, that in his dealings for acquittance with his ward *he must show his actual transaction*

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and approve it to the court's judgment to make the act good against the ward.

9th. All parties acting upon the faith of this release are bound to the result of any inquiry into its validity and by the test of all the finally developed facts relating to it, and the understanding *(not even with the infant herself, but with an interested and exacting father,)* that she was to give a release, and had, *then only ten years old*, promised to grant one, is too preposterous a ground for contract, *and to work a forfeiture of the infant's rights*, to be treated as part of the muniment of Hillen's, or Kennedy's and Glenn's, or Henrietta's, action or pretension.

10th. Conceding validity even more than *prima facie* to the release as concerns *personal liability* in Kennedy and Glenn, and in Hillen, it must be open for inquiry as to its *bona fides*, and if at its recited foundation of actual payment untrue, cannot operate in reference to the *real security* sought here to be made available.

11th. This being a case for the enforcement of a *real security* the statute of limitations cannot apply, nor any bar of time short of at least twenty years, even if, *as is not the fact here*, the trust for our claim had terminated by *an adverse position assumed and notified to us by our trustees*. A trustee's violation of the trust is no such hostile repudiation of a trust, and operates only to put the party in whose favor the violation has occurred in place for all charge against the trust property of the delinquent trustee. 11 *G. & J.*, 217, *Magruder vs. Peter*. 6 *Md. Rep.*, 71, *Eschbach vs. Pitts*. *Ibid.*, 201, *Stump vs. Henry*. *Ibid.*, 418, *Bowie vs. Stonestreet*.

12th. The testimony of Kennedy and of Bedford, and of Scott, is inadmissible from their interest in the case, and if not obnoxious for that, is in itself incompetent as but hearsay, opinion and surmise, and as against written evidence of deeds and contracts.

S. T. Wallis for the appellees, argued:

1st. That the deeds of March 1825, professing to transfer to Mitchell all the property of his step-daughter and supposed

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wife, Henrietta A. Bedford, were procured from her by fraud and duress, and were consequently void. Mitchell held the property subject to her equities, none of which could be divested by any act of his except in favor of a *bona fide* purchaser for value without notice. Mrs. McClellan (as against Mrs. Bedford) was no such purchaser, and the title which Kennedy and Glenn took from Mitchell as trustees for her benefit was liable to be impeached in their hands, precisely as it might have been in Mitchell's. 8 *How.*, 183, *Taylor vs. Taylor*. *Hill on Trustees*, 156, 157. 1 *Story's Eq.*, *secs.* 307, 309, 323. 2 *H. & G.*, 40, *Lowry vs. Tiernan*. 3 *Wheat.*, 493, *Twelves vs. Williams*. 22 *Pick.*, 243, *Clark vs. Flint*. 4 *Paige*, 221, *Dickerson vs. Tillinghast*. 1 *Sme. & Mar. Ch. Rep.*, 49, *Rowan vs. Adams*. 20 *Pick.*, 337, *Holland vs. Cruft*. 10 *Paige*, 180, *Padgett vs. Lawrence*. 1 *Dev. Ch. Rep.*, 106, *Donaldson vs. Bank of Cape Fear*. 10 *G. & J.*, 420, *Jones vs. Hardesty*. *Act of* 1777, *ch.* 12, *secs.* 1, 6, 15.

2nd. That the terms of the reconveyance from Glenn and Kennedy to Mrs. Bedford; her bond of indemnity given to these gentlemen, and her own conveyance to Hillen, are not to be taken separately or together as any relinquishment by her of her equities, or any acceptance of the trusts with which Mitchell had sought to encumber the property. All of these matters we insist were the direct result of the original frauds practised by Mitchell upon her, and were inevitable under the circumstances in which these frauds had placed her.

3rd. That Mrs. McClellan's release to Mitchell, executed when she was of lawful age, is a conclusive bar to the relief sought by the bill. There is no evidence in these proceedings to affect its validity, and the decree invalidating it as against Mitchell is not admissible here, having been obtained in a proceeding in which none of the appellees in interest *were parties or privies*. The release extinguishing the debt necessarily extinguishes the remedy, as well against the property originally Mitchell's, which may have passed to Mrs. Bedford, as against that which was originally her own. *Story's Eq.*

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Pl., secs. 257, 427. 4 *H. & J.*, 521, *Hayward vs. Carroll.* 4 *Gill*, 114, *Griffith vs. Turner.*

4th. That by the evidence of Scott and Kennedy, and the other proof in the case, Mrs. McClellan's release is affirmatively shown to have been fairly and understandingly executed so far as it involved a surrender of all claim against Mrs. Bedford's estate. Mrs. Bedford's difficulties were adjusted on the faith of Mrs. McClellan's promise, that she would execute the release as soon as she should be legally competent therefor. On the same faith Mrs. Bedford assumed to pay, and did pay, a large amount of Mitchell's debts, for which neither she nor her property could otherwise have been made liable. On Mrs. McClellan's arrival at the proper age she redeemed her promise by the execution of the release, and Hillen, on the faith of such actual execution, reconveyed the whole property to Mrs. Bedford on the 2nd of April 1834, thereby closing the whole transaction after it had been nine years pending. The complainants, we therefore insist, are absolutely estopped from now calling the validity of the release into question. 5 *Md. Rep.*, 220, *Miller & Mayhew, vs. Williamson.* 1 *Story's Eq., sec.* 132.

5th. That the property originally belonging to Mitchell himself, which he conveyed in trust to Kennedy and Glenn, and which they may have conveyed to Mrs. Bedford, is not responsible to the complainants in this proceeding any more than the property which was originally Mrs. Bedford's. The debts of Mitchell, which Mrs. Bedford assumed and paid, were larger than the value of his said original property, and he was besides indebted to her for portions of her estate which he had wasted. Moreover the conveyance to her by Kennedy and Glenn was but a part of the compromise into which the promise by Mrs. McClellan to release substantially entered, and which it is not competent now for the complainants to disturb. These considerations, we insist, give an affirmative support to the release over and above its effect as a technical bar, as already suggested in the third point.

6th. That the evidence of Scott and Kennedy is properly before the court, they being individually competent to testify,

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and the matter of their evidence being excluded by no rule of equity. 1 *Greenlf. on Ev., sec.* 420. 1 *Bland*, 268, *Lingan vs. Henderson.*

7th. That the demand of the complainants is barred by limitations, even if Mrs. Bedford was affected by the terms of the trust, the deed of Hillen of April 2nd, 1834, reconveying the property to her, having declared the trusts to be satisfied, and she having therefore claimed adversely to the trusts for a longer period than three years anterior to the institution of this suit. 2 *Story's Eq., secs.* 1520, 1521. *Angell on Lim.*, 171, 172. 3 *G. & J.*, 389, *Green vs. Johnson.* 2 *H. & G.*, 236, *Strike vs. McDonald.* 3 *Gill*, 169, *Allender vs. Vestry of Trinity Church.* 11 *G. & J.*, 230, *Magruder vs. Peter.* 3 *Gill*, 160, *Dugan vs. Gittings.* 4 *Md. Rep.*, 362, *Young vs. Mackall.* 3 *Do.*, 367, *Hertle vs. Schwartze & McDonald.* 6 *Md. Rep.*, 336, *McDowell vs. Goldsmith*, and the same case in 2 *Md. Ch. Dec.*, 390. 7 *Johns Ch. Rep.*, 90, *Kane vs. Bloodgood.* 9 *Simons*, 570, *Dearman vs. Wyche.* Besides this, McClellan himself *recognised* Mrs. Bedford's title to this *very property* by his written offer to purchase it at its full value, made in 1840.

8th. That the whole case of the complainants on the pleadings and proof is inequitable, and entitled to no countenance from a court of justice. The claim is prosecuted, as shown by the proof, against the wishes of Mrs. McClellan, and was never intended to be set up by her. It was not mooted until her marriage with McClellan, and then not until after his letter of December 23rd, 1840, in which he expressly treated the whole property in controversy as Mrs. Bedford's, and offered her full value for it, thereby negativing all claim or pretence of lien upon it on his part or his wife's. The state of Mrs. McClellan's intellect since her marriage, as shown by the appellant's own proof, is such as to divest the case of all moral support, if any, it might otherwise derive from an intelligent effort on her part to cancel her solemn release and appropriate her sister's means to the payment of her father's debts.

John Nelson for the appellants, in reply:

The bill in this case proposes to affect property held in *two*

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rights, viz., that which originally belonged to Mitchell and that which originally belonged to Mrs. Bedford. The foundation of our claim is an *acknowledged indebtment* by Mitchell to his daughter, Mrs. McClellan, as her guardian. This claim was originally secured by *deed of trust* to Kennedy and Glenn of the 25th of August 1825, was *recognized* by the subsequent deed to Mrs. Bedford of the 2nd of August 1827, the bond of indemnity to Hillen and the subsequent conveyance by Mrs. Bedford to Hillen, and by all the proceedings in the case. If the property was now in the hands of the trustees, Kennedy and Glenn, there could be no doubt of the propriety of a decree to sell the land to pay this admitted *lien* of ours upon it. And, apart from any defences, it could be sold in whosesoever hands it might be found. Now what are the defences? They are:

1st. Admitting that our claim is well founded as against Mitchell, the guardian, it is said that it has been *released.*

2nd. If not released that the claim is *barred by limitations.*

3rd. If not released and not barred, yet that the deed of the 2nd of August 1827, as well as the preceding deeds, was a fraud upon Mrs. Bedford, and that her peculiar circumstances and equities are a complete bar to the claim now set up.

1st. Is the *release* a bar to our recovery? The answers admit that the money was due to the ward by the guardian and was never paid. Now was it *competent* for the ward to execute this release to this party? This depends upon the acts of 1829, ch. 216, and 1831, ch. 305. The first of these acts, as we interpret it, does not extend to cases of releases to a party who had ceased to be guardian for more than nine years, and when another party had been appointed guardian in his place, in whose keeping the ward's interest then was. 3 *G. & J.*, 103, *Fridge vs. The State.* The act of 1831 does not *change the law* upon this subject, and its 4th section is applicable to a *particular class of cases only*, viz., of releases to guardians, acknowledged *out of the State.* If then these acts do not apply how stands the case? It is admitted that the money was due. At the time the release was *promised* the ward was but *eleven years of age*, and from that time until

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she attained the age of eighteen she was continually *taught to believe* and *instructed to think* that it was her bounden duty to execute this paper. She was all this time under the absolute and despotic control of her father and guardian. The record is full of proof to this point. Three days after she attained the age of eighteen years she executed this release for more than $14,000, *without receiving one cent therefor*. Now a release executed under such circumstances is *not valid*, either in law or equity. 1 *Story's Eq., sec.* 317.

But again this release has been *decreed null and void* by a court of competent jurisdiction. The record of that case is clearly evidence against *Mitchell*, and why is it not evidence against the *other parties* to this suit? They are *claiming under* Mitchell, under the deed from him to Mrs. Bedford of the 2nd of August 1827. The case of a judgment against a *principal* in a bond being *evidence against* a *surety* is *analogous*, and, as we think, conclusive upon this point. 2 *G. & J.*, 245, *Iglehart vs. The State*. 12 *Wheat.*, 515, *Drummond vs. Prestman*. The case of *Beall vs. Beck*, 3 *H. & McH.*, 242, is explained in 12 *Wheat.*, and in the view of this explanation is *sanctioned* by the court in 2 *G. & J.*, 245, and otherwise it is overruled. The only case to the contrary is that in 4 *Gill*, 113, and that was decided upon the *particular terms of the guaranty* there in question, and depends upon matter *in pais* and not upon a *judgment* which imports *verity*.

There was no acquiescence on the part of Mrs. McClellan. In May 1838, she and her husband filed the bill to *vacate this release*. All the other evidence shows that she and her husband were pressing her claim against Mitchell and of course disregarding the release.

2nd. The next point is as to the question of limitations. The bill was filed on the 15th of December 1841. Mrs. McClellan came of age on the 9th of March 1837. The claim therefore clearly was not barred at law, because she had ten years, after arriving at age, within which to file her bill. The only action at law which could be brought was on the guardian's bond, and of course limitations would not apply. But

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we say that the doctrine of limitations has no application whatever to this case. The claim here is against the property as a *specific lien* in the hands of a trustee, and as to such a *lien* limitations will not run. The claim could not be enforced *at law*, either against Mrs. Bedford or Kennedy and Glenn. It is purely a matter of equity over which that court alone can take cognizance. 2 *Story's Eq., sec.* 1521, *(a.)* 11 *G. & J.*, 217, *Magruder vs. Peter.* 6 *Md. Rep.*, 201, *Stump vs. Henry.* The case of *McDowell vs. Goldsmith*, 6 *Md. Rep.*, 332, decides no other point, for it was not a case of a *specific lien* but simply a *general lien* resulting from the relation *of debtor and creditor.* Now what and where is the *repudiation of this trust?* There is none such in the case. The deed from Hillen to Mrs. Bedford is nothing more than an *absolute conveyance* of this property with *full knowledge* of this claim.

3rd. Now as to the supposed peculiar equities of Mrs. Bedford. There is no evidence of *fraud* in obtaining these deeds. There was certainly none on the part of McClellan. All the unfortunate transactions disclosed by this record have been brought here *by the defence and not by us.* There is no evidence of undue influence except that of this illegal marriage. Mitchell, Glenn and Wright all deny the existence of this influence in their answers to the bill of 1826, to set aside these deeds. In this aspect of the case the arrangement for the settlement of that suit was made. And Mrs. Bedford from time to time *acknowledged* and recognised this claim of Mrs. McClellan. The testimony of Dr. Bedford, relied on as showing fraud and undue influence, is inadmissible, because he has a direct interest in the case as devisee in remainder of his sister, Mrs. Bedford. It is true her will, according to the law of this State, would pass no interest to him, but in New York, where the will was executed and where the parties, both testator and devisee, resided, the law is *different.*

4th. But surely the deed of 1825 is valid so far as the property of *Mitchell himself*, thereby conveyed, is concerned, for he was clearly competent to convey his *own property* to pay this debt due by him to his daughter. There is *no fraud in this.* It was conveyed upon the *special trust* that it should be

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applied to *this very claim*. The parties had no authority subsequently to divest the trust or the property from the purpose of paying this claim expressly secured by the deed of 1825. The new debts and claims paid by Mrs. Bedford for Mitchell cannot be set-off against this undisputed claim of ours thus secured by the deed of 1825.

TUCK, J., delivered the opinion of this court.

Whatever might have been the result of the proceedings instituted by Mrs. Bedford, in April 1826, to vacate the deeds of March and August 1825, if that case had not been compromised, there cannot be entertained a reasonable doubt that the property mentioned in the deed from Glenn, Kennedy and Mitchell to her, dated the 2nd of August 1827, and by her conveyed to Hillen, on the 18th of October of the same year, was thereby made responsible for the claim of Mrs. McClellan against her father, and also for the debts of R. B. Mitchell contained in the schedule filed in the cause. Mrs. Bedford was then not only free from the control of Mitchell, but attended by persons of character and intelligence, who appear to have been anxious to vindicate her rights and to assist in such measures as might be best adapted to redress, as far as the nature of the case would allow, the grievous wrongs which had been inflicted upon her by one whom the law had placed in *loco parentis*, as well by reason of marriage with her mother as by the assumption of the duties of guardian. Pending a controversy as to the validity of the deeds of 1825, and as a compromise and settlement of that suit, the conveyances of 1827 were executed, in which the claims of third persons against R. B. Mitchell were provided for and intended to be secured. It is true these persons had no claim upon Mrs. Bedford, but they were creditors of Mitchell, who, while holding the legal title to the property, had charged it with the claims of his daughters, by the deed of August 1825, with a reservation of the surplus to himself; and by the compromise of the suit involving the validity of the deeds, Mrs. Bedford agreed to take back her own property and also all that Mitchell owned charged with these debts, the schedule debts having

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been substituted in the place of Mrs. Elizabeth Mitchell's claim, which was covered by the deed of August 1825. We think that the compromise of this suit was a sufficient consideration to support her assumption of the debts, and that we ought not now to be influenced by circumstances affecting the subject matter of the original suit, satisfied as we are that Mrs. Bedford acted advisedly, and under the counsel of friends in every way competent and disposed to protect her interests in such an emergency. "If compromises are otherwise unobjectionable they will be binding, and the right will not prevail against the agreement of the parties, for the right must always be on one side or the other, and there would be an end of compromises if they might be overthrown upon any subsequent ascertainment of right contrary thereto." The doctrine of compromises rests on this foundation. 1 *Story's Eq., secs.* 131, 132. Hence we say, that the property must remain charged under the terms of that settlement, unless it has been released by the act of the parties or by operation of law.

In answer to the appellants' claim, reliance is placed:—*first*, on the release executed on the 12th of March 1834; *secondly*, on the plea of limitations; and *thirdly*, on the superior equities of Mrs. Bedford, and of the defendants claiming under her, over those suggested in behalf of Mrs. McClellan; either of which defences, if sustained, will entitle the appellees to an affirmance of the decree.

We have no doubt that Mrs. McClellan was competent to execute, and her father to receive, such a release, for the reasons assigned by the chancellor. 3 *Md. Ch. Dec.*, 252. We do not concur in the view taken here on the part of the appellants, that Mitchell could only have made a settlement with Hillen, the second guardian. When this paper was executed the guardianship of Hillen had terminated, and he had no power to receive and pass acquittances for property or money in her father's hands. This he might have done before Mrs. McClellan attained the age of eighteen, but after that time the power to release devolved on her, and he could no more have concluded her by any settlement with Mitchell than he could have maintained, in his own name as guardian, a suit for the amount due.

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In applying this defence, we must bear in mind that the present controversy is not between the appellants and R. B. Mitchell alone. In this view of the case, it is of little moment whether the release was obtained by improper means or not. There is no pretence, as we understand, that the account in the orphans court did not show the correct balance, or that she was denied opportunity to inform herself on that subject. But the allegation is, that the release was not her free and voluntary act, having been extorted by the despotic influence of her father.

It is true that settlements between guardian and ward, recently after the office has terminated, are not favored, because the influence may be supposed still to continue; but this fact alone is not a fatal objection. In *Forbes vs. Forbes*, 5 *Gill*, 29, a release was sustained, though made only twelve days after the arrival at age; and the conduct of the parties anterior to the release, though occurring during the minority, were held to be connected with and to form the basis of the release; among which acts was a settlement between the trustee and his *cestui que trust*, and the execution by the latter of a release, during his minority, discharging the former from a complicated trust of many years standing. This case shows, that a release after the majority of the party, predicated on information acquired before that time, will be upheld in equity if not otherwise objectionable. In the case before us, the account of the guardianship had been stated by the proper tribunal several years before the date of the release, the last one merely adopting the balance then appearing to be due, with interest added to the time of the release. There does not appear to have been any concealment, nor is there evidence of any undue control by the father over the mind and conduct of his daughter at that particular time. His guardianship had ceased nine years before, and she was no longer under the influence of that relation.

It is said, however, that his authority, as parent, was improperly exerted, although the office of guardian had terminated. This record discloses conduct on the part of this father towards his own child which the strongest language is scarcely adequate to condemn, but in the absence of evidence to show

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that this paper was executed under the coercion of such ill-treatment, and with such inducements moving her to follow the example of her sister Elizabeth, who had executed a release of her claim, we are not prepared to pronounce it void as against these defendants. We lay out of view the testimony of witnesses as to the explanations which were made to Mrs. McClellan, and the understanding of all parties, herself included, while these arrangements were *in fieri*, and when she was a mere child. There would be an end to the protection which the law affords to persons of tender years, if they could be held liable for promises made under such circumstances, when controlled more by excited feelings than the unbiassed exercise of a judgment well informed as to their rights and duty. But as this lady advanced in life, and became more sensibly alive to the degraded condition into which her father had plunged the family, she too may be supposed to have formed a resolution to heal her sister's wounds by this tender of sympathy, and as far as she could, repair her wrongs by closing up all matters of business growing out of that unhappy connection. It is reasonable to infer from their affectionate intercourse, that she was governed by these considerations, and although this conclusion depends in a great measure on the probable suggestions of the human heart in cases like the present, the inference is as just, and entitled to as much respect in reaching her motives, as to suppose that the father's general ill-treatment—though he was not always unkind—was her only inducement to this act, in the absence of facts bearing upon the transaction, at, or immediately before the time it occurred. Besides the considerations of affection likely to have operated on Mrs. McClellan, we find Mr. McClellan himself, in 1840, offering to purchase this property from Mrs. Bedford at its full value, which must be taken as a recognition of her title, as dependent upon the release, because in the absence of that discharge from this debt, Mrs. Bedford had no title to the property clear of this incumbrance.

But, as we have said, this is not a case solely between the parties to that release. Other persons have acted upon it, and made settlements, and parted with securities, under the belief,

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as we must suppose, that it operated a full and valid discharge of Mitchell, and of all who had bound themselves for his default as guardian, and they are now parties defendants maintaining its integrity. That the release is an acknowledgment by Mrs. McClellan of the receipt of the money, at a time when she had authority to make the acknowledgment, cannot be doubted. It is well settled, that "admissions which have been acted upon by others are conclusive against the party making them, in all cases between him and the party whose conduct he has thus influenced; and it makes no difference whether the thing admitted be true or false, it being the fact that it has been acted upon that renders it conclusive." 1 *Greenlf. on Ev., secs.* 207, 298. *Gresley's Eq. Ev.*, 353. Now, the deed to Hillen provides that on payment of the claims mentioned the property was to be reconveyed to Mrs. Bedford. He paid all these debts except that of Mrs. McClellan's. If he had gone to her for information after she attained the age of eighteen, and been informed by her that she was fully paid, and that she had no longer any claim against her father as guardian, can there be a doubt that this would have authorized him to reconvey the property, according to the terms of the trust? Instead of this personal application, however, he found the admission on the record to which he was authorized to apply for information, (*Miller & Mayhew, vs. Williamson, et al.*, 5 *Md. Rep.*, 231,) and acted upon it, without any imputation against its fairness. Is the admission made in one form less conclusive than when made in the other? We think the parties are protected in either case. It is not to be treated as the act of an infant; for the law declares that the instrument "shall have the same effect and operation in law in every respect, and to all intents and purposes, as if such female were of the full age of twenty-one." It cannot be supposed that the framers of the law intended that such receipts, acquittances and releases, should have no effect as evidence of the facts asserted by them. When Hillen had such evidence of the payment of her demand, there was no longer any necessity for the parties to keep the trust open to meet contingencies depending on the validity of an instrument which they had

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no reason to suppose they would afterwards be called upon to vindicate, and, accordingly, we find that on the 2nd of April 1834, he reconveyed the residue of the property to Mrs. Bedford, thus abandoning the only security he held for his bond of indemnity to Glenn and Kennedy, and at the same time giving up to Mrs. Bedford the property which, while in their hands under the deed of August 1825, was charged with Mrs. McClellan's claim, and which she accepted as a final settlement of the trust. These acts having been predicated on Mrs. McClellan's own acknowledgment of satisfaction, must operate to prevent, as between these parties, any inquiry into the circumstances under which that acknowledgment was made.

In answer to this defence, it is shown, on the part of the appellants, that the chancery court had declared the release to be void before this bill was filed. It would be a great hardship, not to say fraud, under all the circumstances of this case, if these defendants were bound by that decree. When that bill was filed the appellants must have known of the deeds mentioned in these proceedings, and, consequently, that Mrs. Bedford, Glenn, Kennedy and Hillen, had a very important interest in sustaining the release which the appellants then sought to condemn as void. They might have been made parties, for, in that proceeding, under proper averments, all the issues presented by this record could have been tried. There was no necessity, in point of law, for that release being first removed out of the way, with a view to this bill. There are cases in which judgments and decrees may be used as evidence in other suits, against persons who were not parties to the decree, but these are exceptions to the general rule, and the present does not in any sense belong to that class of cases. The decisions most relied on by the appellants are *Iglehart vs. State*, 2 *G. & J.*, 235, and *Drummond vs. Prestman*, 12 *Wheat.*, 515. But it is shown, in the case of *Griffith vs. Turner*, 4 *Gill*, 114, that the guaranty in 12 *Wheaton* authorized the confession of the judgment which was relied on as evidence against the guarantor; and that the judgment in the other case, (2 *G. & J.*, 235,) was placed on the peculiar char-

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acter of the instrument by which the surety's responsibility was incurred. This is the plain case of a decree against one person being offered in evidence against another, not a party nor in privity with any party thereto, and is no more admissible here against the defendants, than would be the verdict and judgment against the appellants in their suit against the sureties on the guardian's bond, in which, as appears by the record, this same release was contested. *Hunter vs. Hatton*, 4 *Gill*, 115.

We are also of opinion that the appellants have no claim against the property which did not originally belong to Mrs. Bedford. It must be remembered that the deed to her was the result, in part, of the compromise of the chancery suit, and that her deed to Hillen was also part of that settlement, and that for a consideration, as we have said, she dedicated that property to the payment of certain claims. In our view of the case it matters not whence the property came originally. The question is, whether it has been released, by the parties interested, of the trusts charged upon it? and we think that what has been said as to the release applies with equal force to all this property. Besides, the record shows that Hillen paid from Mrs. Bedford's means quite as much as this property was worth, in discharge of Mitchell's debts, according to the terms of the trust, and we cannot perceive on what principle of equity it can be taken from her representatives for the purpose of paying the claim of Mrs. McClellan in the face of her release.

For these reasons, and without considering the other defences set up by the appellees, we think the decree of the chancellor should be affirmed.

The exceptions filed by the appellants to certain evidence offered by the defendants below were properly overruled. The witnesses objected to had no interest in the result. The trustees had been discharged by the act of Mrs. McClellan; and as to the supposed interest of Dr. Bedford under his sister's will, we have no proof of the New York law as to such dispositions of property, and, clearly, under the laws of this State he can take nothing under the will, the limitation to him being too remote.

Decree affirmed with costs.

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William H. Keighler and others, *vs.* William J. Ward and others.

The writ of *sequestration* is in full force in Maryland, both as a *mesne* process against a party in contempt and as a judicial writ to enforce the performance of a decree, and in its latter office is analogous to an execution at law.

The 4th sec. of the act of 1818, ch. 193, dispenses with demand or notice of the decree before issuing process thereon required by the previous act of 1785, ch. 72, sec. 25, and applies to process of *sequestration* as well as other writs.

Jurisdiction once rightfully asserted by a court of equity, and which would lead to a settlement of all the questions which might arise out of the subject matter in controversy, will exclude all jurisdiction over it by other courts for *similar purposes.*

But proceedings in equity, which contemplate giving *force and efficacy to a deed*, will not prevent the deed from being *assailed* as fraudulent in another court, or by another proceeding in equity.

Choses in action, under certain circumstances, may be *sequestered;* if the party in whose hands the *chose* is admits the debt to be due, and is willing to pay it over under the order of the court, it is subject to *sequestration*, but *not otherwise.*

Where the party in whose hands the *chose* is denies that it is due to the decree-debtor, and sets up a deed of trust, under which he claims title, and avers it to be valid, the court will not, upon return to the writ of *sequestration*, inquire into the *validity* of such deed and determine whether it be *fraudulent* or not.

It is the *resistance* of the party holding the *chose* that defeats the proceeding by *sequestration*, and not the *grounds* upon which the resistance rests.

But where a party levies a *sequestration* upon such a *chose in action* he acquires thereby an *inchoate equitable lien or priority* to the fund contingent upon the result of the question, whether the deed is void or not.

In such case the return to the writ of *sequestration* should not be quashed, but the court should protect the inchoate equitable lien or priority thus acquired, by *retaining the case* until, by other proceedings, the validity of the deed can be determined.

Appeal from the Court of Chancery.

This appeal was taken from an order of the court below quashing the return to a writ of *sequestration* under the following circumstances:

The appellants obtained a decree in the court of chancery on the 13th of May 1851, against Royston Betts for $21,111.26,

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under a bill filed in that court on the 16th of January 1849, and on the 6th of September 1851, filed their petition in the case, setting out the decree and the failure of Betts to pay the same, and praying for the writ of *sequestration* to enforce payment thereof. On the same day the writ was issued by order of the chancellor, and on the 15th of the same month was laid in the hands of William J. Ward and the agents of certain fire insurance companies, and return made accordingly.

Afterwards, on the 22nd of April 1853, the appellants filed another petition, in which, after setting out the decree, the issue, service and return of the *sequestration*, and insisting that thereby the moneys and effects of Betts in the hands of Ward and the insurance companies became subject to the payment of the decree, states, that since the return the said corporations have paid all the moneys of Betts, in their hands, to Ward, who is about to apply them to other purposes, pretending they were not in his hands at the date of the service of the writ, whereas petitioners are advised said moneys were in the hands of the corporations at the time of such service and were paid over to Ward with notice thereof, and are bound in his hands as fully as they were in the hands of the corporations; but to conclude all questions on the subject they pray that another writ of *sequestration* may be issued, to be also laid in the hands of Ward; and that on service thereof he may be required to show forth in certainty what moneys and effects of Betts are in his hands, and how and when he received them, and to bring the same into court to be applied to the decree. The chancellor on the same day ordered the suit to issue as prayed, and directed Ward to answer the petition on or before the 17th of May following. The writ was accordingly issued and laid in the hands of Ward on the 27th of April 1853, and also in the hands of the Franklin Fire Insurance Company on the 29th of the same month.

On the 17th of May 1853, Ward appeared and filed his answer, in which, after admitting the decree and the issue and service of the writ as stated in the petition, he files and submits a copy of a deed of trust from Betts to him, and of his report as trustee thereunder, made to the Superior Court of Baltimore

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city, and the order of said court directing notice to the creditors of Betts, and the notice given conformably thereto, which report exhibits a full account of his trust and the residue remaining in his hands for distribution. He also admits service of the second writ of *sequestration*, and refers to his said report as giving in detail the disclosures required by the order of the chancellor, and asked for in the petition. He states that the original writ of *sequestration* issued after the execution of the deed of trust from Betts to him, and such being the case he submits that his course, preparatory to distribution, in pursuance of the deed, was right and proper, and that such distribution ought to be made, and asks, if requisite, that a hearing may be granted him in the premises before final action thereon by the chancellor.

The report referred to in this answer, and filed with it, shows a balance of $3986.58 in the hands of the trustee for distribution under the deed of trust. The deed of trust from Betts to Ward, also filed with this answer, bears date the 29th of January 1851, and conveys to Ward "all the right, title, claim, demand and interest" of Betts, in and to certain described insurance policies issued in favor of Betts, on which suits were then pending in the Circuit Court of the United States for the Maryland District, and to the money payable and recoverable thereunder *in trust* to receive and apply the same, *first*, to pay the expenses and counsel fees in the suits on the policies then pending; *secondly*, to pay the trustee's commission of eight *per cent.*; *thirdly*, to pay $3000, with interest, to a named creditor in New York, "*and* the residue to divide, without preference, among all the other creditors of said Betts who may come in and release, as hereinafter stated, according to their respective claims, without priority or preference save as by law established; *provided*, *however*, that each of said creditors claiming or receiving any thing, dividend or distributive share under the provisions of this deed or out of said trust fund, shall simultaneously therewith execute and deliver to said Betts, his heirs and representatives, a good and sufficient release of all claim or demand of any nature against said Betts, which could or might be made because of said claims; and

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that in case of the refusal of any of said creditors so to release, the distributive share or shares of the party so refusing shall be divided proportionably among the other creditors so assenting."

Afterwards, on the 27th of February 1854, Ward made a motion in the case to quash the writ of *sequestration*, and the return thereof so far as relates to him: 1st. Because the same, was improvidently issued. 2nd. Because he has no property or effects of said Betts in his hands bound by said writ. 3rd. Because he had no property or effects in his hands, when said writ issued, to which said Betts had any claim, and has not since had any such property or effects. And 4th. For other reasons apparent on the face of the proceedings.

On the 9th of March 1854, the chancellor, (JOHNSON,) delivered an opinion in the case, which is reported in 4 *Md. Ch. Dec.*, 87, and passed an order directing the return to the writs, so far as the same relates to or affects Ward, to be quashed. From this order the complainants appealed.

The cause was argued before ECCLESTON, TUCK and MASON, J.

Thos. S. Alexander and *John V. L. McMahon* for the appellants, argued:

1st. That the deed of trust from Betts to Ward was fraudulent and void as to the appellants, the creditors of Betts:—1st, because it exacts releases of the creditors and at the same time does not profess to be, and is not shown or pretended to be, a conveyance *of all the debtor's property*. Being a deed of *specifics*, it is void *on its face;* it must stand or fall as it thus appears, and you cannot go into outside testimony to show that it does embrace the whole property of the grantor. But if it can be helped out by extrinsic evidence, the *onus* is upon the parties claiming under the deed, and they have offered no such proof in this case. 3 *Md. Rep.*, 48, 51, *Sangston vs. Gaither. Ibid.*, 12, 34, 35, *Green & Trammell, vs. Trieber.* 2nd. Because it does not merely prefer the releasing creditors to those not releasing, but excludes the latter from all benefit and

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substantially reserves the surplus to the debtor. 17 *Verm.*, 310, *Hall vs. Denison.* *Ibid.*, 390, *Dana vs. Lull.* 17 *Ala.*, 549, *West vs. Snodgrass.* 3rd. Because it limits no time for its acceptance.

2nd. It is said the writ of *sequestration* in this case improvidently issued, because no notice of the decree had been given, as required by the act of 1785, ch. 72, sec. 25. But the petition for the writ alleges, that Betts had full knowledge of the decree and refused to perform it, and *notice*, therefore, appears on the face of the petition. No *exception* was taken by Ward either to the writ or the return; no point was made in the court below as to the regularity of the writ, and no question of that kind is now before this court. But if there was there is nothing in it. The 4th sec. of the act of 1818, ch. 193, dispenses with notice and demand before *issuing process*, required by the 25th sec. of the act of 1785, ch. 72, and this refers to *all process* which could be issued under the act of 1785. The writ, therefore, being regularly issued, we say, that on the case before the chancellor at the time of quashing the return, the appellants' right to their sequestration against the trustee, Ward, involved no question as to the right thus to reach the unpaid debts or *choses in action* of Betts, and thus to determine the rights and liabilities as between Betts and his debtors, the insurance companies, but merely the question, whether, after Betts' said debtors had paid over what was due by them to Betts' trustee under his said deed, this process would lie to affect the funds in the hands of said trustee thus received, and claimed and held by the trustee under no other title. The fund was not a *chose in action* due Betts, but *money* paid over by him to Ward. The case, therefore, presents no other right or title as against the appellants' right thus to obtain and appropriate the funds in Ward's hands as Betts' property, as regards them, except the title given by Betts to Ward by that deed, and this deed being in law fraudulent as to the appellants, the law finding it to be so treats the property as if no such deed had been made. 3 *Md. Rep.*, 409, *Spindler vs. Atkinson.* *Ibid.*, 45, *Sangston vs. Gaither.* 7 *Do.*, 380, *American Exchange Bank vs. Inloes.* The question then is, can we get this money by *process*

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of sequestration? As to this we insist, that the sequestration issued in execution of the appellants' decree was proper process to reach any funds or moneys of Betts in the hands of Ward, and the only question, therefore, is, whether the appellants are by law permitted, *under that proceeding*, to deny the validity of the deed, and thus necessarily to show that the funds in Ward's hands are still the property of Betts as it regards the appellants; and lastly, that under that process against the trustee, the holder and representative of the title granted by that deed, and upon his answer admitting the funds in hand and setting up that title under the deed, the appellants were entitled in that proceeding to impeach the title set up under that deed as fraudulent and void as to them. In attachments *at law* against such a trustee, the right of the attaching creditor under that process to impeach the deed as fraudulent as to creditors, and thus to obtain condemnation of the property or funds in the hands of the trustee, has been recognised and sanctioned in this court, and therefore, *a fortiori*, does it exist under this the analogous but more comprehensive process of execution of a court of equity. In England, where sequestration issues on final decree, it is in the nature of *process of execution*. There all process of execution in equity was founded upon *contempt*, and the writ of *sequestration* is one of such processes. 2 *Daniel's Ch. Pr.*, 1244, 1253. 8 *Bac. Abr.*, *(Bouv. Ed.,)* 629, 630. Where the debt is *admitted to be due*, all the authorities say that the writ lies to affect the *choses in action* of the decree-debtor. So *money in hand* admitted to be due. *Tothill*, 175. 2 *Daniel's Ch. Pr.*, 1255, 1256, 1260, 1261, 1262, and the cases there cited. This, indeed, was admitted by the chancellor in his opinion. 4 *Md. Ch. Dec.*, 91. 1 *Beavan*, 263, *Wilson vs. Metcalfe*. But the title may also be inquired into. A writ of *sequestration* may be levied on property fraudulently aliened, and if the fraudulent alienation be set up as a defence, it may be inquired into upon the return of the writ. 2 *Daniel's Ch. Pr.*, 1266, 1268 to 1272, and the cases there cited. 25 *Cond. Eng. Ch. Rep.*, 461, *Empringham vs. Short*, was the case of *fraud in fact* in regard to deeds, and Vice-Chancellor Wigram declared, that he had not the

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slightest doubt of the jurisdiction to try the question, and ordered it to be tried. Such is the English law on the subject. Now what is the Maryland law? It is said the writ is *obsolete* in this State. The act of 1785 recognises, adopts and modifies it so as to make it the most comprehensive of equity processes. It might with as much propriety be said that this *act of Assembly* is *obsolete*. This law puts it beyond all doubt that it is a writ of *execution*. It was intended to reach by it something more than could be reached by a *fi. fa.*, for it speaks of personal estate and "*effects*" as including something more than *visible, tangible property*. And moreover, this act gives the chancellor the power to order it as an *immediate* execution. For the American authorities on this subject, see 1 *Hoffman's Ch. Pr.*, 158, *note* 1. 1 *Edw. Ch. Rep.*, 340, *White vs. Geraerdt*. 12 *Metcalf*, 363, *Grew vs. Breed*. 11 *Paige*, 603, *Hosack vs. Rogers*. That Ward is the only party necessary to be brought before the court in order to assail the deed, see 4 *Barbour*, 237, *Russell vs. Lasher*, and cases there cited.

3rd. That by the proceedings the appellants had under their sequestrations as process of execution, acquired at least an inchoate equitable right to priority of payment of their *decree* out of the funds in the hands of the trustee, which the court below ought to have respected and protected as fully as priorities acquired by the ineffectual levy of executions at law to affect equitable interests, and that even if conceded, (as it is not,) that under this process and the trustee's answer setting up as his only title this deed alleged to be fraudulent on its face, the court below could not adjudicate finally on that title, still it erred in quashing the return and thereby destroying the appellants' priority, and should, on the contrary, have preserved it, by directing such other proceeding in equity or at law as might be deemed necessary to the proper adjudication of that title, and by retaining the sequestration to await the issue of that proceeding. 10 *G. & J.*, 251, *Harris vs. Alcock*. 2 *Md. Ch. Dec.*, 260, *Gill vs. McAttee, et al.* 1 *Edw. Ch. Rep.*, 340, *White vs. Geraerdt*. 8 *Bac. Abr., (Bouv. Ed.,)* 629, 630. 25 *Cond. Eng. Ch. Rep.*, 461, *Empringham vs. Short*. 27 *Maine*, 539, *Sargent vs. Salmond*. 3 *Paige*, 320, *Clarkson vs. De Peyster*.

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4th. That the trustee's report to the Superior Court of Baltimore city, and the order of the court thereon, were no bar to the further continuance of the sequestration against the trustee, and did not justify the court below in quashing it. 7 *Md. Rep.*, 380, *American Exchange Bank vs. Inloes.*

Wm. A. Talbott and *George W. Dobbin* for the appellees, argued:

1st. That the deed from Betts to Ward is not on its face a void instrument, but may be supported by proof that it conveys all the property of the grantor; that it reserves nothing to the grantor, and gives to the creditors the whole time till the payment of the dividend under it to accept its terms, and is therefore beneficial to them. The *intent to defraud* must be gathered from the face of the instrument. The statute itself requires this intent. Upon the face of this deed there is no such intent. The fact that it does not upon its face convey *all the property* of the grantor may make it *voidable*, but does not make it *void*. There is no principle of law and no decision that makes it void. The fact that no time is limited in it for acceptance of its terms, is no objection, for the law presumes that the trust will be executed in a reasonable time. On this point we refer to 3 *Md. Rep.*, 48, *Sangston vs. Gaither. Ibid.*, 12, *Green & Trammell, vs. Trieber.*

2nd. That the writ of *sequestration* is a process of contempt, used to enforce obedience on the part of recusant parties to *mesne* process or final decree of the court of chancery, and that having compelled the submission of the recusant by depriving him of the possession and enjoyment of his property, the law proceeds to execute its final decree by the appropriation of the property thus in possession to the satisfaction of the decree; that the efficacy of the writ depends entirely upon the power of taking into possession the property of the person against whom it is issued, and it has no application therefore to a *chose in action*, when the person against whom the action exists *denies* the right and *withholds* the possession. *Mr. Alexander*, in his *Book on Chancery Practice*, says that this writ is *obsolete* in Maryland, and there never has been any

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instance of its having been obtained before the present case. Prior to the year 1839 all process in England to enforce decrees was process of contempt. Then for the first time process of *execution* was given. The process of sequestration was peculiarly a process of contempt. It did not issue to the sheriff, but to four persons named by the *plaintiff*, who are to enter and take the property and keep it till the party purges himself of the contempt. It has no return day, but exists as long as the party stands out in contempt. Such was the law in England prior to the passage of the new rules in 1839. As soon as our legislature passed the act of 1785, giving the *fi. fa.* and *ca. sa.*, from that moment this writ commenced to become *obsolete*. That act speaks of it as a writ of contempt. It may issue and be levied upon *choses in action* in certain cases. Where the holder admits that the property belongs to the decree-debtor it may properly lie. But where the holder denies title and claims the property himself, and refuses to give it up, in such cases we say it does not lie. There has been no case adduced in which a disputed *chose* has been the subject of the writ or could be affected by it. In support of these views we refer to 2 *Daniel's Ch. Pr.*, 1248, 1249, 1255, 1256, 1 *Hoffman's Ch. Pr.*, 158, *note* 1. 1 *Barbour's Ch. Pr.*, 70, 71. 2 *Simons*, 55, *Johnson vs. Chippindall.* 3 *Swans.*, 309, *Francklyn vs. Colhoun.* 1 *Beavan*, 269, *Wilson vs. Metcalfe.* 4 *Ves.*, 735, *Simmonds vs. Kinnaird.* 1 *Ball & Beatt.*, 387, *McCarthy vs. Goold.* 1 *Ves.*, 198, *Dundas vs. Dutens.* 1 *Ves., Sen.*, 180, *Wharam vs. Boughton.* The act of 1785 does not convert the writ from a process of *contempt* to one of *execution;* this act speaks throughout of *clearing the contempt* whenever this suit is spoken of. As to the point that the appellants have acquired an *inchoate right* by the ineffectual levy of the writ, the case of *Burns vs. Robinson*, 7 *Irish Eq. Rep.*, 188, is a sufficient reply. This case very distinctly says there is *no right* acquired by the party at whose instance the writ issues. Equity will only aid an ineffectual levy where the levy has been made upon the *thing itself*, but by this *writ* the party acquires no such right.

3rd. That the writ of *sequestration* being a process of *con-*

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tempt, it is not within the meaning of the act of 1818, ch. 193, sec. 4, which dispenses with demand of a compliance with a decree prior to issuing process of *execution*, and no *notice* of this decree having been given as required by the act of 1785, ch. 72, sec. 25, the writ issued improvidently.

4th. That this case does not fall within the reason of the *American Exchange Bank vs. Inloes*, 7 *Md. Rep.*, 380, which determines that the pendency of an equity proceeding to administer the trust, will not prevent an attaching creditor from attacking the validity of a deed of trust, as the attachment is a new suit appropriate to try the issue of the validity of the deed, whilst this is an attempt to engraft on the execution of final process a new, complicated and important inquiry involving the interests of parties not before the court.

5th. Because the sheriff's return is not conformable to the exigency of the writ which commands the sheriff to "collect, take, and get into his hands, the goods, chattels and personal estate, and detain and keep the same," &c., and the law, unlike the attachment law with reference to garnishees, furnishes no means by which to reach a *chose in action* in the hands of one who is unwilling to bring the money or thing into court.

Mason, J., delivered the opinion of this court.

The questions involved upon this appeal have never before, as we are aware, arisen in any court in Maryland. They relate to the nature, office and applicability, of the writ of *sequestration*, as a part of our equity jurisprudence. We have no doubt that this writ is in full force in this State, both as a *mesne* process against a party in contempt, as well as a judicial writ to enforce the performance of a decree, and in its latter office may be said to be analogous to an execution at law. The process of sequestration came with our chancery system from England, and has since been fully recognised and adopted by our legislation, as appears from the act of 1785, ch. 72, sec. 25. The circumstance, that it has never been resorted to in practice in this State, does not, on that account, render it inoperative or powerless. In *Bacon's Abr.*,

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8th Vol., 630, it is said of this writ that it has "become the common process in courts of equity, and may be said to be two-fold; that is, it issues either as a *mesne* process on the defendant's default in not appearing, or not answering, after the whole process of contempt hath spent against him; or it issues as a judicial process in pursuance of a decree, and to enforce the performance of it; and it is the execution and life of a court of equity; and as it is the fruit of a long suit it is to be favored, and in this case it is said to be analogous to an execution at common law."

Unless we can discover a purpose on the part of our legislature, as developed by our act of 1785, to alter the character and office of this writ, and the practice under it, as shown by the English authorities, we must look for the general principles regulating the subject to the adjudged cases and elementary works in England. How far then have the English doctrines in regard to sequestration been affected or altered by our act of Assembly, is to be our first inquiry.

The 25th sec. of the act of 1785 requires as a condition upon which this writ, as well as all other process upon decree, shall issue, that notice shall first be served upon the defendant of the passage of the decree, by an attested copy thereof; and by the 26th section it is provided, "that in all cases in chancery the process of commission of rebellion, and sergeant-at-arms, shall be omitted as unnecessary." These, we believe, are the only two statutory modifications made in the law which we need notice; and by the act of 1818, ch. 193, sec. 4, the demand or notice of the decree, as required by the previous act, has been dispensed with, and the party obtaining the decree is entitled to process thereon, without such demand or notice, and this embraces the process of sequestration as well as other writs.

Of one thing we are certain, that there is nothing in the provisions of either of the acts referred to which at all affect the questions involved in the present appeal. They are to be determined therefore upon English authority.

There appears to be no objection taken to any of the proceedings in this case prior to the decree of the 13th of May 1851,

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against the defendant, Betts. The case stands then upon the concession that those proceedings are regular, and that Betts is justly indebted to the complainants in the amount of the decree.

Upon this decree a writ of *sequestration* was issued on the 22nd of April 1853, and at once laid in the hands of W. G. Ward and the Franklin Fire Insurance Company, who, as was alleged, held certain moneys and effects of Betts, the defendant, which were subject, by this process, to be made available towards the satisfaction of the decree. Ward filed his answer, setting up a deed of trust from Betts to him, his report as trustee under said deed to the Superior Court of Baltimore, and the order of that court for notice to creditors, &c. He states that the writ of *sequestration* issued after the deed from Betts was executed, and he submits that he proceeded regularly in the Superior Court, and that the distribution of the trust estate ought to be made under the direction of that court; he also avers, that *he has no property or effects of Betts in his hands bound by or subject to said writ.* For these reasons he moved that the return of the writ be quashed. The chancellor did accordingly quash the return to the writ of *sequestration*, and from that decision the present appeal was taken.

In the argument of this cause the *five* prominent questions discussed, were:—1st. Did not the jurisdiction rightfully assumed by the Superior Court of Baltimore over the trusts, as set out in the deed to Ward, appropriate to that court the settlement of the questions raised on this appeal, to the exclusion of the court of chancery? 2nd. Is the process of sequestration, in any of its aspects, applicable to a case like the present? 3rd. But if so, as Ward *denies* in his answer, that the *choses in action* sought to be reached were Betts', would this proceeding be effectual to test the question of title to those *choses in action*? 4th. Whether the deed of trust was valid and vested a good title in Ward, as against all parties claiming subsequent to its execution? And 5th. Whether by virtue of the decree and the proceedings under the sequestration, the complainants acquired any inchoate equitable priority upon

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the funds in the hands of Ward, which upon a subsequent proceeding might be made available in payment of their decree, provided they cannot be reached under the present proceeding?

The first question is abundantly answered by the decision of this court, in the case of the *American Exchange Bank vs. Inloes*, 7 *Md. Rep.*, 380. A court of equity cannot, by taking hold of a case for one purpose, draw to itself an exclusive jurisdiction over every other discordant question which might arise out of it. It is true that a jurisdiction once rightfully asserted by a court of equity, and which would lead to a settlement of all the questions which might arise out of the subject matter in controversy, will exclude all jurisdiction over it, by other courts, for similar purposes, and the reason of this, which is to prevent a number of conflicting proceedings about the same thing, is wise and just. But that a proceeding like this one pending in the Superior Court, which contemplated giving force and efficacy to a deed, can be said to draw within its ample folds the considerations of questions which assail the very existence of the deed itself, is a proposition not for one moment to be entertained.

The second question we have already determined, to the extent of saying, that the writ of *sequestration* was in force in Maryland. But it is contended, that under no circumstances are *choses in action*, such as stock, debts, &c., subject to sequestration. This was, no doubt, at one time held. 8 *Bacon's Abr.*, 632. But a different or modified doctrine now prevails, and it may be said to be the result of the best adjudged cases in England, that *choses in action*, under certain circumstances, may be sequestered. The chancellor's views upon this particular point are correct. It may be stated as a settled point, upon strict authority, that if the party in whose hands the *chose* is admits the debt to be due to the defendant, and is willing to pay the same over under the order of the court, it becomes thereby subject to sequestration, but not otherwise. 2 *Daniell's Chan. Prac.*, 1261. 1 *Hoffman's Chan. Prac.*, 157. *White vs. Geraerdt*, 1 *Edw. Chan. Rep.*, 340. *Johnson vs. Chippindall*, 2 *Sim.*, 55. 1 *Beavan*, 369.

This then leads us to the [third] inquiry, whether Ward's

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denial of his liability to Betts defeats the writ? Clearly, by this denial, the case is made to fall within the general principle just stated, that there can be no sequestration against a party denying his indebtedness, unless it may be shown by some further proceeding that the objection is untenable, as will be more fully explained hereafter. The appellants seek to except this case from the operations of the general rule, upon the ground, that as Ward has thought proper to exhibit a deed in support of his title to the property, which upon its face, as is alleged, is void for fraud, therefore the law will treat the property as if no deed had been executed. This objection simply resolves itself into the general proposition, that *choses in action* held by fraud are subject to sequestration, notwithstanding the party holding them denies the charge and resists the proceeding, and thus resistance, resting upon such a ground, is held to be an exception to the general rule, that *choses* in the hands of an unwilling party cannot be sequestered. We cannot discover any authority or good reason for such a proposition. The general principle is doubtless designed to avoid such collateral proceedings and inquiries as would unavoidably result from such resistance. What questions are more fraught with difficulty or attended with more protracted controversies than questions arising out of allegations of fraud? And this is abundantly illustrated by the question of fraud raised upon this appeal. It has elicited a most able and prolonged argument, and if the zeal manifested by the counsel be any index of their real convictions upon the subject, they must have been sincere in maintaining the conflicting positions assumed by them, and thus we have a clear case of *controversy* presented to us, which, if we were now to decide upon this collateral inquiry, we would upturn the established doctrines and practice upon the subject. It is no answer to our objection to say, that because we can see from the case made, (if such were the fact,) that Ward has no title, therefore the sequestration must go against him. Such a view might apply to nearly every case, or would make the question depend upon the *degree* of difficulty which each case would present, while the law says that *the resistance* must defeat the proceeding, and not the *grounds* upon which the resis-

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tance rests. The appellants say the deed is void upon its face, and the appellee denies it; if we were to look into the deed for the purpose of determining this point, we would be simply *settling* the question, and what more could we do in regard to any other controversy that might arise out of such a proceeding? The authorities seem to leave the determination of this question, whether to abide the sequestration or not, entirely with the party affected by it. If he may resist the writ without assigning any reasons for doing so, is it not unreasonable that he should be worse off for having assigned insufficient or bad reasons?

The fourth question, as to the validity of the deed, after what has already been said, ought not to be decided upon the present appeal. To do so would be to disregard what we have laid down under the previous head as the proper rule upon the subject.

The fifth and last ground taken in argument relates to the supposed inchoate equitable lien created by this proceeding upon the funds in the hands of Ward. This is a most important proposition, and to some extent a new and unsettled one. *Daniell*, (2 *Vol.*, 1262,) says, that the question, "whether, when the party in possession of the *chose in action* refuses to admit, or disputes his liability, the court will authorise the institution of proceedings, either at law or in equity, for the purpose of enforcing the *sequestration* against such party, is a point which still appears to remain uncertain." See also *Simmonds vs. Kinnaird*, 4 *Ves.*, 735. *White vs. Geraerdt*, 1 *Edw. Ch. Rep.*, 336.

From the analogy of the case of *Harris vs. Alcock*, 10 *Gill & John.*, 226, and upon general principles of equity and justice, we are disposed to believe and do so accordingly decide, that the complainants have acquired, by virtue of the *sequestration*, an equitable lien or priority to the funds in controversy, contingent however upon the result of the question, whether the deed of trust from Betts to Ward is void or not.

The complainants having had a valid, equitable claim against Betts sought to enforce the same in the only court having ample jurisdiction over the subject, and having done so obtained a decree in chancery for the amount due them. In order

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to obtain, by due course of law, the fruits of their decree, they resorted to the only legal process suited to the emergencies of their case, namely, the writ of *sequestration*, which was laid upon property or effects in the hands of Ward, which belonged, as was alleged, to Betts. The efficacy of this writ is defeated, under a well settled principle of law, by Ward, who denies that the property is Betts', and in support of this denial relies upon the deed of trust. The complainants thus find the estate of Betts, or a large portion of it, which they consider, both in law and equity, bound for his debts, transferred beyond their reach, by means of what they allege to be a fraudulent conveyance. What is to be the consequence of this condition of things, provided the deed should turn out to be void? Are the complainants to lose the fruits of their vigilance, which, in every court, is preserved and protected, not from any laches, delay or mistake on their part, in pursuing their proper, legal remedies, but from a technical, and perhaps untenable objection, which could not have been averted, made by one, who, at best, is but a mere third party or stranger to the proceedings? Can it be said that these parties must abandon and lose all benefit resulting from this proceeding, shown to be regular and proper, up to the time of this objection, because of the interposition of such an objection on the part of Ward? If the remedy of these complainants had been at law, and they had obtained a judgment instead of a decree, an attachment by way of execution would have reached the funds in the hands of Ward, and notwithstanding any objection he might make the validity of the deed would have been inquired into, and if found void the funds would have been summarily condemned. Are we now to say that there are remedies at law in cases where there are none in equity? Without this equitable lien, which is contended for by the appellants, they would be either remediless or would be driven to a slow and tedious proceeding, instituted expressly to vacate the deed, which would result equally to the benefit of all creditors, while, in the mean time, more fortunate, though not more wise or vigilant creditors, would probably, by means of attachments, or otherwise, sweep away the debtor's whole estate.

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The court of chancery could therefore properly have retained this case until such other or additional proceedings could be had, at law or in equity, as the exigencies of the case might require, by which the question of the validity of the deed could be settled. Until this was done the court ought not to have quashed the return to the *sequestration*, but on the contrary, we think, that the appellants had, under their process of *sequestration*, which, in this case, was in the nature of an execution or attachment at law, acquired, at least, an inchoate equitable lien or priority, which the court ought to have protected until the final termination of the whole controversy. If the deed should be declared void, and the funds in the hands of Ward decided to belong to Betts, they should be distributed with reference to the priority or preference acquired by the complainants by virtue of their process of *sequestration*.

In the foregoing opinion we have said enough to dispose of the several questions as presented upon the present appeal. All questions arising out of the deed should be left, as we have said, open for future consideration upon proceedings hereafter to be instituted to test its validity.

Decree reversed and cause ordered to the Circuit Court of Baltimore city. The costs to be paid out of the estate.

Eccleston, J., delivered the following separate opinion:

Although the recent English decisions have held that a *chose in action* may be made subject to the payment of a decree in equity, under a writ of *sequestration*, yet, in my opinion, the English and American authorities show it to be true, as a general rule, that the process of *sequestration* will be defeated if objected to by the person charged with being indebted to the defendant in the decree. In this case, however, the objection made by Ward is based upon the assignment or conveyance in trust, made to him by Betts, which instrument is alleged to be fraudulent and void.

A court of equity has long been considered the proper tribunal for deciding whether a conveyance is void for fraud. And as the instrument on which Ward bases his objection to the

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sequestration has been alleged to be fraudulent, I think the chancellor should have retained the writ for the purpose of having the question of fraud settled; so that in case of a decision adverse to the validity of the conveyance the *sequestration* might then be available to the complainants, because of the removal of Ward's objection by a court having competent and appropriate jurisdiction in reference to matters of fraud.

Under the English practice certain preliminary steps were necessary for putting a defendant in contempt before a writ of *sequestration* could be issued against him; but by our acts 1785, ch. 72, sec. 25, and 1818, ch. 193, sec. 4, these preliminary steps are dispensed with; and therefore the present writ was not irregular for want of them.

Entertaining these views I think the order of the chancellor should be reversed and the cause remanded for further proceedings.

GEORGE W. HUGHES *vs.* JOHN T. DAVIS.

The act of Congress of 1804, ch. 56, extending the provisions of the act of 1790, ch. 11, to the records and courts of the respective *Territories* of the United States, is a constitutional exercise of the legislative power of Congress.

This act being constitutional, *nil debet* is not a proper plea to an action of debt brought in this State upon a judgment recovered in the circuit court for the District of Columbia.

APPEAL from the Circuit Court for Anne Arundel county.

Debt, by the appellee against the appellant, upon a judgment recovered in the circuit court for the District of Columbia. Plea, *nil debet*, to which the plaintiff *demurred*. A record of the judgment, with a transcript of the whole proceedings in the district court, was filed in the case. The court, (BREWER, J.,) sustained the demurrer and gave judgment thereon for the plaintiff, from which the defendant appealed.

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The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

Henry M. Murray for the appellant. The *first* section of the *fourth* article of the Constitution of the United States declares, that "Full faith and credit shall be given in each *State* to the public acts, records and judicial proceedings of every other *State;* and the Congress may, by general laws, prescribe the manner in which *such* acts, records and proceedings shall be proved, and the effect thereof." This clause of the constitution is the only one under which Congress could have derived the power to pass the acts of 1790 and 1804, and it confers no power upon that body to enact, that full faith and credit shall be given to the judicial proceedings of *Territories*, but only to those of *States*. That the District of Columbia is not a *State*, within the meaning of this clause of the constitution, has been decided by the Supreme Court of the United States, in the case of *Hepburn vs. Ellzey*, 2 *Cranch*, 452. Congress has as much power to declare the judicial proceedings of England entitled to the same faith and credit which the constitution gives to the judicial proceedings of the States, as it has to declare that such faith and credit shall be given to the judicial proceedings of *Territories*. There is no warrant to be found in the constitution for the supplemental act of 1804, ch. 56, extending the provisions of the act of 1790 to the records and courts of the *Territories*, and such legislation is therefore *void*. If the act of 1804, ch. 56, be unconstitutional, there is no statutory mode of authenticating such a record as the one in the present case, and it must be left to the States to declare what shall be the attributes of authenticity. A judgment of the circuit court of the District of Columbia is not recognised by the constitution or acts of Assembly of Maryland, nor by the Constitution of the United States, and is, therefore, in the category of *foreign* judgments, to which the plea of *nil debet* is allowable and the only proper plea.

Frank H. Stockett for the appellee. For more than *fifty-two years* since its enactment, the *constitutionality* of the act

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of Congress of 1804, ch. 56, has never *been questioned.* It is referred to in 3 *Story's Com. on the Cons., sec.* 1307, *note* 1, and by Chancellor Kent, and has always been acted upon as a constitutional exercise of the power conferred upon Congress, without question from any quarter. If the strict construction of the constitution contended for on the other side be the true one, then the act of 1790, ch. 11, is unconstitutional, for it gives effect to judgments of the States in *any of the courts* of the country, not confining them to the courts of the *States.* 7 *Cranch,* 481, *Mills vs. Duryee.* If these acts be, as we insist they are, constitutional, then it is conceded that the plea of *nil debet* is not a good plea in this case.

Le Grand, C. J., delivered the opinion of this court.

This was an action of debt, brought in the circuit court for Anne Arundel county, on a judgment obtained by the appellee against the appellant in the District of Columbia. The defendant pleaded *nil debet,* to which the plaintiff demurred. The court sustained the demurrer and gave judgment for the plaintiff. From this judgment the appeal is taken.

It is conceded that the plea of *nil debet* is not a proper plea, if the act of March 27th, 1804, be a constitutional exercise of the legislative power of Congress. That act extended the provisions of the act of May 26th, 1790, to the records and courts of the respective Territories of the United States, and countries subject to the jurisdiction of the United States, as well as to the records and courts of the several States.

On the behalf of the appellant it is contended, that Congress had no power to pass this act of 1804: that the fourth article of the Constitution of the United States only authorises Congress to prescribe, by general laws, the manner in which the records and judicial proceedings of the States shall be proved, and that inasmuch as the District of Columbia is not a State, the act of 1790 does not relate to the judgment sued upon in this case.

The necessity of such an enactment as that of 1804 must be conceded by all, and inasmuch as it has, so far as we are informed, been treated ever since its passage as a constitutional

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exercise of the power of Congress, we do not feel at liberty to declare it to be otherwise.

In the writings of Justice Story and Chancellor Kent on the constitution, as well as in a great number of decided cases, the act of 1804 is referred to and has been acted upon without the slightest suggestion from any quarter of its unconstitutionality.

Judgment affirmed.

HENRY CLINE and ROBERT FRANCIS, *vs.* WILLIAM D. MILLER.

A contractor mortgaged the lots, on which he was about to erect certain houses, to defendant, to secure advances for the purchase of materials for their erection, to be made by the latter in instalments as the houses progressed to completion. He then gave an order upon defendant, in favor of plaintiffs, for bricks to be furnished by them, payable out of these advances in four instalments, the third of which was payable when the houses were plastered, and the balance when they were *completed by the contractor*. Defendant accepted this order on condition, that when the houses were plastered he was to give his note for the balance then due the plaintiffs, at six months, "*for their accommodation.*" The bricks were furnished to the contractor upon the basis of this order and acceptance. The two first instalments were duly paid, and when the houses were plastered, the instalment then due, instead of being paid by a note at six months, was paid in cash, deducting five *per cent.* Defendant then for the balance tendered his note at six months, *provided* plaintiffs would sign a receipt that it was given for their *accommodation*, and that they were to pay it *unless the houses were completed by the contractor*. This they refused to do and sued upon the acceptance. The contractor never did complete the houses. HELD:

That by this acceptance the note to be given was a note for the *accommodation* of the plaintiffs, in the legal and technical sense of that word, to become the *real* note of defendant only in case the houses were completed by the contractor, and this contingency never having occurred, the plaintiffs could not recover.

A payee may refuse a conditional or qualified acceptance, yet if he *takes* such an one when offered, he can only claim payment according to the condition or qualification.

As between the original parties to a bill or note, the total or *partial* want or failure of consideration may be relied on as a defence, and a *partial* failure avoids the note only *pro tanto*.

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Where this court can see from the admitted facts of the case that the appellants have no cause of action, a *procedendo* will not be ordered, though the prayer excepted to may be wrong.

APPEAL from the Superior Court of Baltimore city.

Assumpsit, by the appellants against the appellee, on an acceptance of defendant on a draft drawn by one Andrew Birmingham in favor of plaintiffs. The declaration contains the common counts only. Plea, *non assumpsit*.

Exception. The facts of the case are fully stated in the opinion of this court. After the evidence was closed, the defendant asked the court to instruct the jury, that by the terms of the acceptance offered in evidence, defendant was only bound when the houses, referred to in the order accepted, were plastered, to give to plaintiffs his or his firm's note, at six months, for the balance then due the plaintiffs, not exceeding the amount of bricks specified in the order, as an accommodation note to be provided for by the plaintiffs at maturity, unless, in the mean time, whilst said note was running to maturity, the said houses be completed by said Birmingham, in which event said accommodation note was to become a real one; and if the jury shall find from the evidence that he tendered such accommodation note to the plaintiffs, or either of them, on condition they would sign the receipt given in evidence, and that they declined receiving the same on that condition, and that the houses were not completed by Birmingham before the institution of this suit, then the plaintiffs are not entitled to recover upon any of the counts in their declaration. This prayer the court, (FRICK, J.,) granted, and the plaintiffs excepted and appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

Orville Horwitz for the appellants, argued:

1st. That the words, "for their accommodation," in the acceptance, mean for the *convenience of all parties*, including Miller, and not simply that Miller was to give an *accommodation* note, in the legal, technical sense of that term. The cir-

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cumstances of the case fully justify this construction. The original order was to pay $250 in cash when the houses were plastered. This condition was varied by the *acceptance*, and instead of this *cash payment*, he pays by a note at six months. This was for Miller's accommodation and was the consideration upon which he was to give a *note for value*, and not an *accommodation* note.

2nd. The fact that when the houses were plastered Miller paid Cline & Francis, instead of $250 in cash, the sum of $237.50, equivalent to a note at six months, at a discount of five per cent., clearly shows that Miller himself construed these words of the acceptance to mean a *note for value* for the accommodation of *all parties*, and not simply an *accommodation note*.

3rd. The materials furnished by Cline & Francis were bricks, which went into the houses to secure *Miller* for his advances, and this enhancement of his security was the *consideration* for his giving his note. It cannot be said, therefore, that there was no *consideration* for this note, for both the fact that the materials furnished went into the houses and thus enhanced Miller's security for the advances and the extension of six months on the *cash payment* when the houses were plastered, furnished ample consideration for a *note for value*.

4th. Again, this was an order drawn upon a *fund* in the hands of *Miller*. He had then in his hands, due Birmingham, more than $3000 when this order was drawn and accepted. His obligation to pay it is, therefore, upon this ground alone, clear. Again, the acceptance was good for the amount due when the houses were plastered, and being good for part, is good for the whole. *Byles on Bills*, 224, 226.

John H. Ing and *Thomas W. Hall, Jr.*, for the appellee, argued:

1st. That the words, "for their accommodation," in this acceptance, have a well defined and settled meaning when used with reference to bills of exchange and promissory notes, in accordance with which established signification in commercial usage they must be taken to have been used by Miller, and to have been understood by the parties.

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2nd. That an accommodation note is one drawn or endorsed, without consideration, by the accommodation drawer or endorser, to enable the party accommodated to raise money on it or otherwise to make use of it. *Byles on Bills*, 100, 323. In this case Miller had contracted with Birmingham to advance on certain houses certain sums, at stated periods, in the progress of the buildings, the last advance to be made when the houses "were fully completed and finished." His liability to make these advances was therefore dependent and conditional. The houses never having been completed by Birmingham Miller was released from all liability to make the fourth advance, which, under his contract, was payable only in the event and at the date of their completion. The order accepted by Miller was to pay the appellants certain sums in instalments "*out of the above named advances.*" If, therefore, in consequence of the non-completion of the houses no liability of Miller ever accrued to pay the last advance, neither was there any liability on his part to pay the appellants the balance claimed in this action, payment thereof, *by the terms of the order*, being expressly made dependent on the same contingency as that of the advance out of which it was to be made. Any note therefore drawn by Miller in favor of the appellants, before the completion of the houses, would have been wholly without consideration on his part, and as between the parties an *accommodation* note. *A fortiori* must such be the case where it was expressly stipulated that the note so to be given to the appellants should be "*for their accommodation.*" The materials furnished do not constitute any consideration as between the parties to this suit so as to make a note, given by Miller on account of a balance due for such materials, for that reason a note for value and not an accommodation note, because in fact the materials were furnished, not to Miller but to Birmingham, and the liability of the former to pay for them grows out of the fact of his acceptance of Birmingham's order, and must be expressly limited by the terms and conditions of that order and acceptance.

3rd. That the obvious intention of Miller, to be inferred, as well from all the circumstances of the case as the use of the

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words, "for their accommodation," was to accommodate the appellants; that is by substituting for a future and uncertain cash payment, contingent on the future completion of the houses by Birmingham, a present loan of the name and credit of Miller, to enable the appellants, for their accommodation, to raise money thereon, necessarily with the implied understanding, that if the houses never were finished the note should be provided for at maturity by the parties accommodated. The receipt demanded by Miller and the prayer granted by the court below were therefore equally justified by a proper view of the rights of the parties and the facts of the case. The words "for their accommodation" do not signify for the convenience of *all parties*, Miller included, but for the accommodation or convenience of the appellants exclusively. The words of the the acceptance, (which must be construed together,) are, "I will give my note or my firm's note for the balance then due Cline & Francis at six months for *their* accommodation," and can by no construction be understood to imply a note for *Miller's* accommodation. The fact that when the houses were plastered, Miller, instead of paying $250 in cash, (then actually due,) paid $237.50, equivalent to a note at six months, at a discount of five *per cent.*, affords no foundation for the inference that thereby Miller has himself construed the words in the acceptance in favor of the appellants, but on the contrary their acceptance of this $237.50 in satisfaction of their demand at that time, and their omission, (the houses being then plastered,) to claim a similar liquidation of "the balance then due them," affords a strong inference that they did not consider themselves entitled to any other than an *accommodation note* for such balance, and that they *then* acquiesced in the construction evidently insisted on by Miller, that they were entitled to a "*note for value*" only for the third instalment of $250 and not for the *balance*, the payment of which was made dependent on the completion of the houses.

4th. That upon a fair construction of the terms of the order of Birmingham and the acceptance of Miller, considered as it properly and necessarily must be, in connection with the terms and conditions of Miller's contract with Birmingham, set forth

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in the mortgage, independently of the use of the words, "for their accommodation," and on the theory of a general and unqualified acceptance of the order by Miller, the non-completion of the houses by Birmingham, operated as a complete release of all and every liability on the part of Miller to pay the appellants the balance sued for in this action. It cannot be said that the money to pay this balance is in the hands of Miller by virtue of his contract with Birmingham, contained in the mortgage, because by the express limitation of Birmingham's order, as accepted by Miller, this balance was payable exclusively out of the *fourth* instalment to be due "when the said houses are completed by me," (Birmingham.) In fact the houses never were so completed. Birmingham never became entitled to the fourth instalment out of which this balance was to be paid; and even if Miller had in his hands, *(which cannot be inferred,)* any balance of the first three instalments he had no right, under the order, to appropriate it to Cline & Francis beyond $750 as against Birmingham or his assigns.

Eccleston, J., delivered the opinion of this court.

On the 26th of November 1851, Andrew Birmingham executed a mortgage to William D. Miller to secure certain advances agreed to be made by Miller for the purpose of aiding and assisting Birmingham in the erection of ten houses, on certain lots of ground in Baltimore, the same day leased by Miller to Birmingham. Those advances were to be $400 on each house, provided they were completely finished by Birmingham. The security intended by the mortgage being dependent upon the progress of the houses to completion, it was stipulated that $75 on each should be paid by Miller when the second story of joists should be laid, $100 when the roofs should be put on, $125 when the houses should be plastered, and $100 when the same should be fully completed and finished. The whole sum of $4000 thus to be advanced was to be expended in the purchase of materials for, and in defraying other expenses necessarily incurred by Birmingham in, the erection and construction of the buildings. The appellants, Cline & Francis, (who were brick-makers,) received an order

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from Birmingham on Miller, dated the 29th of November 1851, in the following words:

"*Mr. William D. Miller,*—Please pay Messrs. Cline & Francis for two hundred and fifty thousand bricks, more or less, to say, for the run of kiln six dollars and fifty cents per thousand, and fifteen dollars for front brick per thousand, to be paid out of advances made to me on ten houses to be built in Gay street, between Caroline and Dallas, that is to say, twenty-five dollars on each house when the second floor of joists are laid, and the same amount on each when roofed in, and the same amount on each when plastered, and the balance to be paid when the said houses are completed by me. It is also understood they are to furnish me the paving brick at $6.50 per thousand. ANDREW BIRMINGHAM."

On which order was endorsed the following acceptance: "December 10th, 1851. Accepted with the condition, that when said houses are plastered I will give my note or my firm's note for the balance then due Cline & Francis, not exceeding the amount of bricks specified herein, at 6 months, for their accommodation. WILLIAM D. MILLER."

On the basis of this order and acceptance the appellants furnished to Birmingham, prior to the 1st of August 1852, bricks to the amount of $1751.37. On the 13th of March 1852, the first instalment of $250, or $25 on each house, was paid under the order; and the second instalment of the same amount was paid on the 23rd of April in the same year. On the 21st of July following, and after the ten houses were all under roof and plastered, payment of the third instalment was made under the following circumstances: It was suggested that the sum of $250 was not then payable in cash, but that Cline & Francis were only entitled to a note for the same at 6 months, whereupon they made an abatement of 5 per cent. or $12.50. The receipt given for this payment is, as follows:

"$250.00
"5 00. 12.50
"237.50

"Received, July 23rd, 1852, amount of 3rd instalment of $250.00, of W. D. Miller, on the within order.

CLINE & FRANCIS."

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On the 24th of August 1852, the note of the defendant, at six months, dated the 13th of the same month, for the balance then due the plaintiffs for bricks, was tendered to them by the defendant. Which note was offered on the condition that the plaintiffs, or one of them, would sign a receipt acknowledging the note was given for their accommodation; and that if at its maturity the houses should not be completed by Birmingham, then they, the plaintiffs, were to take up and pay the note, they having no claim on Miller for the payment of the note, until the houses should be completed by Birmingham, but that when so completed then the note was to be paid by Miller, and not otherwise. The plaintiffs refused to sign the receipt, and instituted this suit on the 6th of January 1853. The houses never were finished by Birmingham, and the defendant denies that he is responsible to the plaintiffs.

The original contract for the bricks having been made between the plaintiffs and Birmingham, and it being admitted that they were supplied by the former to the latter, "on the basis of said order and acceptance," the liability of Miller, if any exists, must rest upon the order and acceptance; and the words "for their accommodation," at the conclusion of the acceptance, have given rise to the controversy.

The terms on which the defendant proposed giving his note not having been acceded to by the plaintiffs, none was given; and this suit is based upon the acceptance alone, the *nar* containing no special count but the common counts in *assumpsit*. The dispute is whether the plaintiffs can recover the fourth or last instalment mentioned in the order; the other three, it is admitted, have been paid, and no claim is made for either of them.

The plaintiffs insist there was such consideration for the acceptance as shows it not to be what the law considers accommodation paper, that an accommodation note in its legal sense was not designed, but the word accommodation simply meant for the convenience of the parties. In support of this view it is said, that by the contract between Miller and Birmingham, and by the terms of the order, when the houses should be plastered the former was to pay two hundred and

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fifty dollars in cash, whereas by the acceptance he was to give a note at six months, when the houses were plastered, for both the last instalments. By this he gained a credit of six months instead of paying cash, and that was a consideration for promising to give an absolute note, including the last or contingent instalment, depending upon the completion of the houses. But it must be recollected, that at the date of the acceptance all the payments were contingent, none absolutely due, and might never become so. If the order had been accepted in its own terms the defendant would never have been responsible for the last instalment, as the houses never were finished by Birmingham.

And it does not seem to be a reasonable supposition, that the credit of six months upon $250 induced the defendant to agree to bind himself, unconditionally, to pay nearly $1000, when, previously, his only responsibility rested upon a contingency which might never happen, and when in the instrument, by which he bound himself to the plaintiffs, it is expressly said, he did so "for their accommodation." As the original agreement was, that the advances should be made to Birmingham, the defendant was under no legal obligation to the plaintiffs until he accepted the order.

Although a payee may refuse to take a conditional or qualified acceptance, yet, if such an acceptance is offered and he takes it, he can only claim payment according to the condition or qualification. *Chitty on Bills*, 287, 288, 301, 302, 303, (*Ed. of* 1842.) *Byles on Bills*, 149, *marginal page*. *Story on Bills*, 240. The plaintiffs agreed to the terms proposed in this instance by taking the acceptance, which stipulated that the note to be given to the plaintiffs should be "for their accommodation. In proper grammatical construction the word "their" relates to "Cline & Francis." The defendant having given such an acceptance, and the plaintiffs having consented to receive it, by the express agreement of the parties, the note to be given was to be a note for the accommodation of the plaintiffs. In view of the language employed, and especially when considered in connection with the order and circumstances in the cause, it would require a very forced con-

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struction to say that the word "accommodation" was not designed to be used in its legal or technical sense, but that inasmuch as the defendant was to get six months' credit on $250, he was to bind himself, unconditionally, to pay nearly four times that sum, instead of remaining only responsible upon a contingency, and therefore the acceptance only meant the note was to be given for the convenience of all the parties. It would seem to be rather a singular mode of providing for the convenience of the defendant, whilst the accommodation of the plaintiffs would be very evident, as they were to get a note at six months for the $250, and the larger sum previously depending upon an uncertain contingency.

The mortgage shows that Birmingham was lessee of the lots and designed erecting the buildings as his own. For the purpose of aiding him in doing so, Miller agreed to advance or lend him $4000, to be paid in four instalments. To secure the repayment of the loan the mortgage was executed, and the efficacy of the mortgage as a security for the money depended upon the erection and completion of the houses. For that reason the advances, from time to time, were made to depend upon the progress of the buildings, and the last was not to be made until the houses were completed by Birmingham. Until that was done, he had no right to demand the last instalment. The order shows it was drawn in reference to the contract disclosed in the mortgage. Instead of the order being accepted, payable in its own terms, the acceptance was as already stated. Now under these circumstances it would seem reasonable to suppose, that in saying the note which was to be given should be for the accommodation of Cline & Francis, it was intended they should be accommodated with the name and credit of Miller, or of his firm, by a note at six months, which might be discounted in the market, thereby obtaining the use of the money at once instead of waiting for the houses being finished; but designing at the same time, that as between the parties the note should be accommodation paper for the purpose of preventing Miller's contingent liability from being converted into an absolute responsibility. If such was not the meaning of the words, "for their accommodation," and so intended by the

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parties, those words were perfectly useless, meaning nothing but what would have been effected by the acceptance without them. But by giving them the construction we have indicated they have their usual legal signification, and whilst giving them effect in accordance with their legal import, they will be so interpreted as to be consistent with what may very fairly be considered as designed by the parties, especially in regard to the last instalment, which is now the only one in contest.

The result shows, in dollars and cents, what was the value of the six months' credit on the third instalment of $250. Miller cashed it for $12.50. If then the plaintiff's interpretation of the acceptance be correct, the defendant was induced to convert his uncertain liability for the last instalment into a positive obligation to pay it in six months, for the very moderate consideration of $12.50. And this is not all, because by such an arrangement, the payment ceasing to depend upon the completion of the houses, the motive on the part of Birmingham to finish them, so carefully provided for in the original contract and also recognised in the order, would no longer exist. And if Miller, by his acceptance, was bound to pay the last instalment to the plaintiffs whilst the houses were unfinished by Birmingham, the security for the repayment of the money under the mortgage would not be equivalent in value to what was originally designed, by making this advance to depend upon the completion of the buildings. No doubt money will produce very strange effects sometimes, but it is scarcely possible that a man of even ordinary business intelligence, much less one of large experience and shrewdness, would, for five per cent. on $250, make a surrender of such important rights, so securely protected, as we are asked to believe was done by this defendant.

But the plaintiffs insist, that as the third instalment was no longer contingent after the houses were plastered, for the note which was to be given, so far at least as that was concerned, there was a consideration, and to that extent the note could not be accommodation paper, and if not, it could not be so for any portion of it. In other words, they say that a note or bill of exchange, which, as between the original parties, is

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binding in part on account of consideration to that extent, cannot be accommodation paper for the residue. But if binding in part, it is likewise so *in toto*. This we understand to be the view of the plaintiffs' counsel, whilst relying upon the authority of *Byles on Bills*, 226, in 16 *Law Lib.*, 141, who, in giving a definition of an accommodation note, described it as being without consideration. But the writer was not considering the precise point now before us, and his definition in its general application is correct. We think, however, an examination of the authorities will show they do not sustain the doctrine contended for by the plaintiffs' counsel.

Barber vs. Backhouse & others, Peake's Nisi Prius Cases, 61, was an action on a bill of exchange. Brown, one of the defendants, had suffered judgment by default, the other defendant had paid £5, 9 s., into court. For the residue of the bill they contended they were not liable. The £5, 9 s., paid into court was the amount of the plaintiff's bill for business done as an attorney for all the defendants; the remainder of the claim was for business done for Brown only, who had drawn the bill on the partnership and accepted it unknown to the other defendants.

Law for the plaintiff contended, that the payment of the money into court admitted the bill was good for part, and if good in part it was good *in toto;* but Lord Kenyon thought otherwise, and the jury found a verdict according to the opinion of the court. At the next term, Mr. Law said he was perfectly satisfied with the decision.

In *Darnell vs. Williams*, 2 *Stark. Rep.*, 166, the payee sued the acceptor on a bill of exchange for £19, 5 s. It was proved, that after the bill became due the defendant paid £10 upon it and took the bill away with him. The defendant proved, that when the bill was tendered to him for acceptance he said he had agreed to accept a bill for £10 only, but that the plaintiff having urged him to do it as an *accommodation* to him, the plaintiff, he had accepted the bill. The sum of £10 had been paid into court. Lord Ellenborough held: "That although with respect to third persons the amount of the bill might be £19, 5 s., yet as between these parties it was an

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acceptance to the amount of £10 only, and the plaintiff was nonsuited."

In *Story on Prom. Notes*, sec. 190, it is said, that the total or partial want or failure of consideration may be insisted upon as a defence or a bar between any of the immediate or original parties to the contract. And in the same section the author says: "If there be a partial want or failure of consideration, it avoids the note only *pro tanto*." See also *Story on Bills*, secs. 184, 187, and the notes, and *Byles on Bills*, 98, 99.

In *Chitty on Bills*, 70, it is said: "The defendant may show that he received no consideration, or none that was in point of law adequate, and thus may entirely defeat the action or reduce the claim." See also *Mulliken vs. Boyce*, 1 *Gill*, 65.

According to the principles recognised in these authorities, although it may be, that after the houses were plastered the acceptance would have bound the defendant to the extent of $250, because there was consideration to that amount, and if that sum had not been paid it might have been recovered from him, still it does not follow, that he could not have defended himself successfully against the fourth instalment in consequence of the houses not being completed.

Even supposing that in consequence of the contingent liability of Miller for the last instalment there was not a *want* of consideration, yet as it is admitted the houses never were finished by Birmingham, there is *a failure* of consideration, and that is a good defence against the present claim under the acceptance.

The bricks furnished by the plaintiffs were sold and delivered to Birmingham, not to Miller, consequently that transaction did not, originally, constitute any consideration as between the parties to this suit. Nor do we see that the evidence shows any responsibility at any time from the defendant to the plaintiffs, except what the order and the acceptance created. Inasmuch, therefore, as the order provides for the payment of the last instalment when the houses should be completed by Birmingham, which is consistent with the original contract between him and Miller, and which provision was made for the secu-

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rity and protection of the latter in regard to the advances he was to make; and it is admitted that the houses never were finished by Birmingham; and the acceptance is with the condition that the note to be given should be for the accommodation of the plaintiffs, we do not think there is any legal obligation on the defendant to pay the last instalment.

The claim of the plaintiffs is based upon the order and the acceptance. The order, in express terms, makes the fourth payment to depend upon the completion of the houses. The acceptance, in providing that a note, including the amount of this payment, should be for the accommodation of the plaintiffs, seems designed for the very purpose of preserving the responsibility of the acceptor in its contingent character, and the contingency on which he was to pay not having occurred, the plaintiffs have no right to demand payment of him.

In our opinion, it is shown very clearly by the plaintiffs' proof, in connection with the facts admitted, that they have no cause of action against the defendant; it is, therefore, unnecessary to enquire into the correctness of the decision below in regard to the defendant's prayer, because whether right or wrong, the case would not be sent back under a *procedendo*. We will therefore say—

Judgment affirmed.

JOHN H. ING and JOHN J. MILLS, Adm'r of WILLIAM P. MILLS, *vs.* THE STATE, use of MARTIN LEWIS and CHARLES McCOY.

Where a case is referred under the act of 1778, ch. 21, and an award made by the referee, no reasons are good on *caveat* to such an award except those specified in the 9th section of that act, or those apparent on the face of the award.

In case of bonds given to the State the uniform practice in this State has been to institute the suit in the name of the State, and to endorse on the

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writ and declaration the names of the parties for whose use and benefit it is prosecuted.

In such cases, though the judgment is always entered up for the amount of the damages laid in the declaration, yet it is accompanied by a release, (which constitutes a part of it,) on payment of the sum awarded by the jury, court or referee, as the case may be.

The party for whose use the suit on such a bond is instituted is in fact regarded as the *real* plaintiff, though the State, technically speaking, is so.

It is incumbent on the party suing on such a bond to show that he has an interest in it before he can recover in a regular trial prosecuted to verdict.

Where a cause is referred under the act of Assembly, all matters are within the submission which could be introduced by *amendment* of the pleadings, and the reference *waives* the necessity for averring such matters in the declaration or other pleadings.

The referee has nothing to do with the particular issue joined in court, nor is it of any importance whether any issue be joined previous to the reference; the reference is a reference of the *whole case* to be tried on *its merits*.

APPEAL from the Superior Court of Baltimore city.

Debt, in the name of the State, for the use of the appellees against the appellants upon an appeal bond. The condition of the bond and the pleadings in the case are fully stated in the opinion of this court. While the cause was under rule rejoinder to the replication assigning breaches, the record states that upon motion, and in pursuance of the act of Assembly in such case made and provided, and by consent of parties, "the whole matter in variance between the said parties was referred to William A. Talbott," who made the award, which is also fully stated in the opinion of this court. To this award the defendants filed various exceptions, of which the following only were relied upon in argument in this court:

1st. That the award does not set forth what was the nature of the decree mentioned in the condition of the appeal bond, nor adjudge and show the *damages* in nature and extent sustained by reason of a breach of that condition, and does not state the amount payable in discharge of the penalty of the bond is for such damages.

2nd. That if *any* amount could be awarded in the case against the defendants, there could, *at the utmost*, be *but the amount stated in the replication* as the amount of damages and costs ($37.71) adjudged by the Court of Appeals, which

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amount should be the sum to be stated in the award, as that on payment of which the judgment for the penalty of the bond should be released.

3rd. That it does not appear by the award, nor by any of the pleadings in the cause, that Lewis and McCoy, for whose use the bond is sued, had any interest whatever in the decree appealed from, or had suffered, or *could have suffered*, any damage by the appeal, or *how* they were *damaged* in the premises or how *connected* with the decree, but the *contrary appearing*, inasmuch as the *only parties* named in the condition as interested therein *are others than said Lewis and McCoy*.

4th. That there is no sufficient replication whereon any award could be made or any judgment of the court be rendered.

All these exceptions the court below, (FRICK, J.,) overruled, and gave judgment in conformity with the award, from which the defendants appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, J.

Thos. W. Hall, Jr., and *Chas. F. Mayer* for the appellants, argued:

1st. That this suit is to be treated as if brought directly in the name of Lewis and McCoy, and they must *show themselves* interested in the bond and damaged by the appeal, and that the averments of the pleadings must thus connect them with the bond to authorise any award in their favor, which has not been done in this case. *Act of* 1835, *ch.* 380, *sec.* 7. 1 *G. & J.*, 231, *Kiersted vs. The State.* 2 *H. & G.*, 71, *Wood vs. Fulton, et al. Ibid.*, 277, *Laidler vs. The State.* 6 *H. & J.*, 336, *Beall vs. Lynn. Ibid.*, 95, *Hewitt vs. The State.* 1 *H. & J.*, 361, *Goldsmith vs. Tilly.* 8 *G. & J.*, 359, *Boteler, et al., vs. The State.* Only the parties to the suit recited in the condition of the bond as that on which the appeal was taken are entitled to the benefit of the bond, and Lewis and McCoy are not there recognised as parties.

2nd. At least the award should have introduced Lewis and

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McCoy as beneficially entitled under the bond, and should have shown how they became interested in it and to what extent damaged by the appeal. But the award gives the recovery for damage to *the State*, if *the party damaged* can be interpreted to have been *at all* provided for by the award, and if the award can be considered in effect as determining *any thing more* than that the obligors became indebted to the State by the bond, and that the indebtment being *debitum in presenti*, judgment *for the debt* must pass for the State. Certainly no more is affirmed by the declaration, and the award by its terms used responds to merely the declaration and grants only what the *declaration* claims. It is unquestionable, however, that *the State* cannot, under the condition of the bond, be the *damaged party*, and it is only *with the damage and the sufferers* that the suit or the award had to deal. 3 *H. & McH.*, 357, *Whetcroft vs. Dorsey.*

3rd. The replication for the ground-work of a breach recites a *different case*, as affirmed by the Court of Appeals, from that to which the condition of the bond limits itself, while it still omits any reference to the present plaintiffs, Lewis and McCoy, as the actually interested parties. Without a due replication there was no basis for an award, and in such suits as this the replication is an expansion of the declaration, or effectively a new declaration. *If there be pleadings* they must be resorted to for describing the claim. 5 *H. & J.*, 61, *Morgan vs. Blackiston.* 6 *Do.*, 10, *Cromwell vs. Owings.* 2 *H. & G.*, 82, *Birckhead vs. Saunders.* 6 *H. & J.*, 138, *Karthaus vs. Owings.* 5 *G. & J.*, 65, *Mackall vs. Jones.* 11 *Do.*, 160, *State vs. Gaither.* 3 *Do.*, 377, 388, *Turner vs. Walker.* 11 *Do.*, 470, *Newcomer, et al., vs. Kline* 8 *Gill*, 74, *Merrick vs. The Trustees of the Bank of Metropolis.*

4th. If the replication be deemed of any avail to warrant an award for Lewis and McCoy, (as which this award seeks to operate,) no larger damages than the $37.71, specified in the replication as the *damages and costs, could, at the utmost*, have been legally awarded by the referee. 6 *H. & J.*, 134, *Karthaus vs. Owings.* 7 *Do.*, 339, *Laurenson vs. The State.* But it is said this award is a *verdict*, and as such cures the

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defect in the pleadings. But the rule is that a verdict cures a title *defectively stated*, but not a defective *title*, (2 *Tidd*, 950; 1 *Pet.*, 67, *Minor vs. The Mechanics Bank*,) and no recovery whatsoever, as has already been urged, was under any circumstances practicable under the peculiar condition of the bond, which precludes liability where indemnification has not been made. 11 *G. & J.*, 457, *Newcomer, et al., vs. Kline. Hurlstone on Bonds*, 9 *Law Lib.*, 108.

F. K. Howard and *S. T. Wallis* for the appellees, argued, that the court properly refused to set aside the award:

1st. Because there was no allegation or proof of any such fact as invalidated the award, nor was there any error in law apparent on the face thereof. The act of 1798, ch. 21, sec. 8, specifies the reasons for which an award made upon a reference by order of court under that act, and no reasons can be relied on except such as are there specified, and errors apparent upon the face of the award. 3 *H. & McH.*, 121, *Dorsey vs. Jeoffray*. See also upon this point 10 *G. & J.*, 192, *Caton vs. McTavish*. 1 *H. & J.*, 364, *Goldsmith vs. Tilley*. 6 *Do.*, 10, *Cromwell vs. Owings*. *Ibid.*, 95, *Hewitt vs. The State*. *Ibid.*, 403, *Rigden vs. Martin*. 5 *Md. Rep.*, 361, *Ebert vs. Ebert*. *Act of* 1826, *ch.* 200, *sec.* 17. The form of the award is that prescribed in the books of forms, are in the case of *Fisher vs. The State*, 1 *H. & J.*, 416.

2nd. Because there was no such defect in the pleadings as prevented the court from rendering a valid judgment thereon. Judgment might have been properly entered against the defendants by default prior to the reference, they never having rejoined to the replication. After the reference and award it is too late to object to errors of pleading, and judgment was properly entered on the award, as it might have been had a *verdict* been rendered instead of an award, or a default actually entered prior to the reference. For these positions see 1 *Chitty's Pl.*, 673. 3 *H. & McH.*, 388, *Dorsey vs. The State*. 3 *H. & J.*, 115, *Tyson vs. Rickard*. 1 *H. & G.*, 6, *Vandersmith vs. Washmein*. 11 *G. & J.*, 487, *Ragan vs. Gaither*. 8 *Gill*, 75, *Merrick vs. Bank of Metropolis*. 4 *Md. Rep.*,

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521, *Price & Martin, vs. Thomas & George.* 10 *Mass.*, 263, *Forseth vs. Shaw.* 4 *Pick.*, 454, *Coffin vs. Cottle.* 9 *Gill*, 281, *Clammer vs. The State.* 2 *G. & J.*, 441, *Karthaus vs. Owings.* 5 *Gill*, 280, *Frantz vs. Smith.* 7 *Md. Rep.*, 195, *Burgess vs. Lloyd.* 1 *Cushing*, 457, *Merrill vs. Gold.* 16 *Maine*, 219, *Adams vs. Hill.* 2 *Aiken*, 325, *Batchelder vs. Hanson.* 10 *Verm.*, 216, *Eddy vs. Sprague.* 2 *Green. N. J. Rep.*, 334, *Hazen vs. Addis.* 5 *Munf.*, 14, *Ligon vs. Ford.* 15 *Penn. State Rep.*, 22, *Ward vs. Stevenson.* 1 *Pet.*, 67, *Minor vs. Mechanics Bank.* A submission to arbitration is a waiver of all errors in pleading. 2 *H. & G.*, 281, *Laidler vs. The State.*

LE GRAND, C. J., delivered the opinion of this court.

This was an action on a bond, instituted in December 1852, in the name of the State of Maryland, for the use of Lewis and McCoy, against Ing and William P. Mills, on an appeal bond, dated April 8th, 1852, a certified copy of which was filed with the declaration. The bond was given in a certain cause depending in Baltimore county court, sitting in equity, wherein William D. Miller was complainant, and John Colfer, Samuel Ortlip and Jacob Dorsey were defendants, and was conditioned thus: "if the said John H. Ing shall hold all parties to the proceeding (the said cause in equity) harmless from all loss sustained by said appeal in case the same be not prosecuted with effect, or if the decree should be affirmed, then the said bond to be and remain in full force and virtue, otherwise of no effect."

There are no breaches set out in the declaration. It was replied to by the plea of general performance. The replication sets out, as the only breach of the condition, that before the institution of this suit, it was on the decree and the appeal "in the said writing obligatory mentioned, in such manner proceeded between the said John H. Ing and the said parties to the said cause in equity, in the Court of Appeals for the western shore of Maryland, held at Annapolis, the 12th of June 1852, by the said Court of Appeals, that the said decree of said county court was in all things affirmed and ratified,

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and it was considered and adjudged by the said Court of Appeals, that the said appellees to the said suit should recover against the said John H. Ing the sum of thirty-seven dollars and seventy-one cents, for costs and damages in that behalf laid out and expended, by pretence of prosecuting the said writ of appeal and upon the premises, as by the record thereof in said Court of Appeals remaining, more fully appears; and the said plaintiff avers that the said John H. Ing did not prosecute the said writ of appeal with effect, and that the said decree was affirmed, and that the said John H. Ing did not hold all the parties to the proceeding harmless from all loss sustained by the said appeal, and that the said John H. Ing hath not paid the damages and costs awarded by the Court of Appeals aforesaid."

While the case was under rule rejoinder, it was, "according to the act of Assembly," referred by order of court to William A. Talbot, Esq., who, upon the 26th of October 1854, returned into court his award, which is as follows, (omitting the titling of the cause:) "I, William A. Talbott, appointed referee by the Superior Court of Baltimore city in this case, having given due notice to the parties of the time and place of hearing their respective allegations and proofs, and having heard and duly considered their said allegations and proofs, do award and determine that the said defendants are indebted to the said plaintiff in manner and form as the said plaintiff hath declared against them. And I do further award and determine, that the judgment for the plaintiff be entered in the said cause for the debt and damages in the declaration and costs, to be released on payment of the sum of nine hundred and seventeen dollars, and thirty-two cents, with interest from this date, and costs."

To this award several exceptions were filed on behalf of the appellants, which were overruled by the court. Most of these exceptions were abandoned in this court and others relied upon in argument.

The form of the award of the referee is in strict conformity with that given in the 1*st Vol. of Evans' Harris*, 20. The reference was under the act of 1778, chapter 21, the 8th section of which authorizes the court to enter up judgments

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upon awards; and the 9th section of the same act declares: "That such award shall remain seven days in the General Court during their sitting, if returned to the General Court, or four days in the respective county courts during their sitting, if returned to any county court, after the return thereof, before any such judgment shall be entered up; and if it shall appear to the justices of the court to which any such award shall be returned, within the respective times aforesaid, that the same was obtained by *fraud* or *malpractice* in, or by *surprise, imposition,* or *deception* of, the arbitrators, or *without due notice* to the parties, or their attorney or attorneys, it shall and may be lawful for the said court to set aside such award and refuse to give judgment thereon."

In the case of *Dorsey vs. Jeoffray*, 3 *H. & McH.*, 121, it was determined by the Court of Appeals, that no reason was good on *caveat* but those mentioned in the act of Assembly, or which were apparent on the face of the award.

In the case now before us it is not pretended the award is assailable on any of the grounds enumerated in the act of Assembly; and, therefore, if it be invalid, it must be so because of something apparent on its face. If the award *alone* be examined then there is, clearly, nothing irregular or defective in it. This we did not understand the counsel for the appellants to question. The point of their argument was, that the award should be taken in connection with the pleadings in the cause, and that if it were so regarded it would appear:

1st. That the persons for whose use the judgment was entered had no interest; and—

2nd. That in any event there could be no award or judgment beyond the amount of costs mentioned in the replication to the plea of the appellants.

In reply to the first objection it is but necessary to observe, that for a great length of time it has been the uniform practice in this State, in cases like and similar to the present, to institute the suit in the name of the State, causing the names of the parties for whose benefit it is prosecuted to be endorsed on the writ and declaration. Although the judgment is always entered up for the amount of damages laid in the declaration,

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yet it is accompanied by a statement, which, in fact, constitutes a part of it, that it is to be released on the payment of the sum awarded by the jury, court or referee, as the case may be.

Such a practice enables the party, for whose use the suit is instituted, by a proper assignment of breaches of the bond and proof, to recover the amount of damage he has sustained by the breach. He is, in fact, regarded as the real plaintiff, although the State, technically speaking, is so. The 7th section of the act of 1835, chapter 380, provides, that when any county court, as a court of equity, shall require bond, with or without security, to be given in any case, and the parties concerned therein shall be numerous, or it shall for other reasons appear proper to the court to take bond in such form, such bond may be taken in the name of the State as obligee, and be sued by any person interested as public bonds may; and even prior to the passage of the act of 1835, the Court of Appeals held, in 1 *Gill & Johnson*, 231, that the uniform practice for twenty years allowed persons interested to bring suits on bonds taken in the name of the State, although the acts of Assembly, under which they are required to be executed, contain no specific provision for making them to the State, or give to the party, in language, the right to sue. These references are sufficient to show the suit was properly brought. There is no doubt that it is incumbent on the party suing on the bond to show he has an interest in it before he could recover in a regular trial prosecuted to verdict.

Whether, in the present aspect of the case, it is important the interest of the *cestui que use* should have been distinctly set out in the replication, and whether, if not, the referee was limited by the submission to the amount of costs mentioned in the replication, are questions to be disposed of on the authority of adjudged cases.

There is no doubt a verdict will cure many defects in the pleading, and so will an award under rule of court. *Vandersmith vs. Washmein*, 1 *H. & G.*, 6. *Dorsey vs. State, use of Ann Dorsey*, 3 *Harris & McHenry*, 388. In this last case the record showed that the writ issued in debt; that the cause

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was referred and an award returned by the arbitrators; upon which award judgment was entered for the sum awarded. *It did not appear that any declaration was filed in the case.* On writ of error the General Court affirmed the judgment of the county court. In *Merrick vs. The Trustees of the Bank of Metropolis*, 8 *Gill*, 75, the court, adopting the language of authorities, say, "cured by verdict means, that the court will, after verdict, presume or intend that the particular thing required to sustain it was proved at the trial;" again, "after verdict, a defective allegation in the declaration cannot be taken advantage of, though it might furnish good cause of demurrer." In the case of *Merrill vs. Gold*, 1 *Cushing*, 460, Shaw, C. J., says, "the court are inclined to the opinion, according to the argument of the plaintiff, that, by the reference of a cause by a rule of court, in the usual form, all technical exceptions to the form of the declaration, and the strict rules of proceeding, are *waived* by the mutual consent of the parties on which the rule is founded, and by which the case or cause of action is referred and embraced in the submission." The Judge continues, "and perhaps the question, whether any matter is or is not within the submission, *is well tested by another, to wit, whether the same matter could be introduced by way of amendment, either by varying an existing count or filing a new one, because if it is simply another mode of stating the same cause of action it is admissible, otherwise not.*" Now regarding the replication in this case, as it undoubtedly is, but a practicable continuation of the original declaration, there certainly cannot be a doubt on the mind of any one that it would have been competent to the plaintiff to have amended it by the averring of the facts which are deemed necessary to have been in it by the counsel for the appellants; and if this could have been done under the decision last referred to, the submission *waived*, or did away with all necessity for the averments insisted upon. And in the case of *Eddy vs. Sprague*, 10 *Vermont*, 217, the Supreme Court say: "It has never been considered, under the English statute or at common law, that the arbitrator had anything to do with the *particular issue* joined in court, or that it was of any importance whether any

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issue was joined previous to the reference. It is customary there to enter up a verdict for the plaintiff for the full amount of the damages claimed in the declaration, subject to the award of the arbitrators, to whom the case is referred." In the same decision it is said: "If the declaration or other pleadings are defective the defendant cannot, on that account, move in arrest of judgment. If the case is referred, standing on the plea of a release, it is competent for the arbitrator to try 'the case' on any other issue. The declaration is important only in order to determine the extent of the submission, and with this view, a copy of it is, in practice, usually attached to the rule issued by the clerk. But it was never known that any other part of the pleadings was copied into the rule, which is the authority for the referees to proceed. It is clear then that the reference of a cause, by rule of court, is not, with us, considered a reference of the particular issue joined in court. *It is a reference of the whole cause to be tried on the merits.*"

In a very careful examination of all the cases referred to by counsel, and due consideration of the arguments addressed to us, we have been unable to discover aught in conflict with the doctrine which we have stated from the authorities referred to. We consider the referee, under the submission, had the right to decide the case on its merits, and that whatever defect there may have been in the pleadings, if any, was waived by that reference. There appearing no error on the face of the award, nor any allegation of misconduct on the part of the referee, as specified in the act of 1778, there is nothing left to us but to affirm the judgment.

Judgment affirmed.

Edward W. Salmon, Permanent Trustee of James Boon, *vs.* John W. Pierson.

In cases in insolvency, the right of appeal is given only to persons *aggrieved* by the decision of the court below, and the *trustee* has no right to object to

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the claims of creditors, and to appeal from an order allowing such claims, where the creditors themselves acquiesce.

He may appeal where the decision complained of affects the interests of *all the creditors* by diminishing the estate out of which they are to be paid, or where he is defeated in attempts to augment that fund by the recovery of property or money which he thinks belongs to the creditors.

If he has an interest as trustee in reference to his allowance for commissions and expenses, or as a creditor of the insolvent, he has an equal right, with others, to object to the distribution and to appeal.

APPEAL from the Court of Common Pleas for Baltimore city, sitting in Insolvency.

In this case the auditor allowed the claim of the appellee against the insolvent estate of Boon. The *trustee* excepted, on the ground that if there be any claim whatever on the part of Pierson, it is one arising after the application of Boon for the benefit of the insolvent laws. Testimony was taken, and this exception was overruled by the court, (MARSHALL, J.,) and the claim allowed. From this order the *trustee* appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.; by *Charles H. Pitts* for the appellant, and *T. Parkin Scott* for the appellee. The arguments of counsel, which related solely to the *merits* of the claim, need not be reported, as this court dismissed the appeal, upon the ground that the trustee had no right to appeal.

TUCK, J., delivered the opinion of this court.

The right of appeal from decisions in insolvency is granted, by the act of 1849, ch. 88, only to persons aggrieved by the action of the court below. If the appellant does not come within this designation, the appeal must be dismissed.

The trustee of an insolvent represents the creditors, and may appeal, under the laws upon that subject, where the decision complained of affects the interests of all the creditors, as for example, by diminishing the estate out of which they are to be paid, or where he is defeated in attempts to augment that fund by the recovery of property or money which he thinks belongs to the creditors. But his relation to the estate does

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not authorise him, under this act of Assembly, to object to the claims of creditors, who may, if they please, litigate, *inter sese*, as actors in reference to the same subject matter. It is his duty to protect all alike, which is quite inconsistent with any pretension to contest with one or more for the benefit of the others. If he has an interest, as trustee, in reference to his allowance for commission and expenses, or as creditor of the insolvent, he has an equal right, with others, to object to the distribution and to appeal. But what interest can he set up to continue litigation here, after a decision below to which the parties really interested do not appear to have objected? As mere custodian of the funds, he cannot interplead, as it were, in this unnecessary manner, to the expense and diminution of the estate, too often inadequate to pay the just claims upon it.

We are aware that this case is supposed to be analogous to that of a trustee in chancery, who, it was said in *Ellicott vs. Ellicott*, 6 *G. & J.*, 35, may appeal from an order distributing the proceeds of sale. In that suit, however, the appellants, the trustees, were heirs at law and personally interested in the proceeds of sale; and although the decision of the court was not placed on that ground, the circumstance distinguishes that case from the present. Besides, it does not appear, that in the case of *Kent vs. Alexander, Trustee of Mullikin*, referred to and relied upon in the opinion, any point or question was decided as to the right of appeal; and in fact, that record shows that the exception to the auditor's account was made by Kent, a claimant against the estate, and that the appeal was taken by him because his claim was rejected. At a later period, the Court of Appeals, in *Balch vs. Zentmeyer*, 11 *G. & J.*, 283, where the appellant was a trustee in chancery contesting the claim of the appellee, appear to have considered the question as not conclusively settled. They say, "in making this affirmance, however, we desire to be considered as expressing no opinion on the right of the trustee, in his own name, to prosecute this appeal in behalf of parties present in court and litigating their claim by their solicitor." In the present case the creditors had filed their claims, and if they acquiesced in the audit, we cannot discover that the trustee can, with legal pro-

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priety, object in their behalf, not being himself aggrieved by the decision below, to which description of persons the right of appeal is confined by the act of Assembly. Under the circumstances of the case, the costs will be paid out of the trust estate.

Appeal dismissed.

WILLIAM B. NELSON *vs.* JOHN W. PIERSON.

A trustee in insolvency cannot employ a professional adviser and charge his compensation to the estate; but where the assistance of counsel is required in prosecuting or defending the interests of *creditors*, compensation therefor is properly payable out of the funds.

APPEAL from the Court of Common Pleas for Baltimore city, sitting in Insolvency.

In this case the appellant preferred a claim against the insolvent estate of James Boon of $100, for professional services rendered the trustee in relation to the trust. The proof in regard to the claim is stated in the opinion of this court. To the allowance of this claim the appellee, another creditor, excepted. The court, (MARSHALL, J.,) allowed the claim to the extent of $25, for services rendered the insolvent in preparing his insolvent papers, and referred the case back to the auditor with directions to allow the claim to this extent only, upon proper proof, remarking that he "did not think it admissible, as a principle, that a trustee should employ counsel in all cases, and especially should retain a permanent counsel, whether required absolutely or not." From this decision Nelson appealed.

The cause was submitted to the court, LE GRAND, C. J., ECCLESTON and TUCK, J., without argument.

TUCK, J., delivered the opinion of this court.

We agree with the Court of Common Pleas, that a trustee in insolvency cannot employ a professional adviser and charge his compensation to the estate. But where the assistance of

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counsel is required in prosecuting or defending the interests of the creditors, they are properly payable out of the funds. *Young's Appeal*, 8 *Gill*, 286. The proof shows, that there were many cases before justices of the peace, to all or some of which the appellant attended professionally. We think when the case was remanded to the auditor for further proof of claims, liberty should have been allowed to the appellant to make good his claim, by showing the extent and character of his services and the value thereof. The record will be remanded under the act of 1849, ch. 88, that further proceedings may be had according to the views here expressed. The costs should be paid out of the estate.

Cause remanded.

William Hamilton and A. Robinson, *vs.* Chas. Rogers.

A clause in a mortgage of goods in a store, providing for "all *renewals* and substitutions for the same, the object being to include, not only the articles *then* in the store, but *whatever may be at any time therein*, in the course of the mortgagor's business," *cannot* convey *subsequently acquired* goods so as to give the mortgagee a right of action *at law* against a party seizing them.

To make an assignment valid at law the thing which is the subject of it must have an actual or potential existence at the time of the grant or assignment.

Where the mortgagee sues for the taking of goods so mortgaged the *onus* is on *him* to show that the goods seized were on the premises at the date of the mortgage.

To enable him to recover to the extent of the goods on the premises at the date of his mortgage he must show that they were known to the defendant so to have been on the premises, or he must point them out *as such* to the officer making the seizure.

Where the property mortgaged is *commingled* with that subsequently acquired by the mortgagor it is presumed to be done with the mortgagee's permission, and if it be so intermixed as to prevent separation or identification the rights of *third* parties cannot be affected thereby.

Appeal from the Court of Common Pleas for Baltimore city.

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Trespass vi et armis, brought on the 18th of July 1854, by the appellee against the appellants for entering the plaintiff's store house and seizing and taking therefrom certain goods described in the declaration. Plea, *non cul.*

1*st Exception.* The plaintiff offered in evidence a mortgage to him from Joseph D. Worley, dated the 6th of June 1851, reciting that Worley is indebted to Rogers in the sum of $5314.80, being for the purchase money of the stock in trade and property conveyed by the mortgage for which he had given his promissory note, payable in ten days, and to secure which the mortgage is executed. It then conveys to Rogers "all the stock and materials" in certain stores in the city of Baltimore, "consisting of saddles, trunks, harness, saddlery, hardware tools, leather and other materials, *together with all renewals of and substitutions for the same or any part or parts thereof; the object of this conveyance being to include, not only the articles at present in said stores, but whatever may be at any time therein, in the course of said Worley's business, so long as said note in whole or in part remains due and unpaid;* together with the household furniture in the house occupied by said Worley." The mortgage further states, that Worley had put Rogers in possession of all the property thereby conveyed, by delivering to him "one saddle, one bridle and one chair, at the sealing and delivery of these presents, in the name of the whole premises." The mortgage was to be void on payment of the promissory note above mentioned, according to its tenor, and until default in payment thereof the property was to remain in possession of Worley, the mortgagor.

The plaintiff then offered to examine Worley as a witness, but defendants objected to his competency. The plaintiff then filed two *releases*, one from Rogers releasing Worley and all the property conveyed by him to his trustee in insolvency, from all claim on account of the balance of the debt still due, secured by the mortgage; and the other from Worley assigning to Rogers all claim to the property described in the *nar* and in the mortgage, and to all damages which may be recovered in this suit. The defendants still objected on the ground that he was interested in the result of the suit, but the court, (MAR-

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SHALL, J.,) overruled this objection and the defendants excepted.

2nd Exception. The plaintiff asked a witness what each set of harnesses, which defendant, Robinson, took from plaintiff's store, was worth at retail prices? To this question defendants objected, but the court overruled the objection, saying, that evidence as to retail and wholesale prices might be given, and that the jury might judge as to what price they would allow if at all. To this ruling the defendants excepted.

3rd Exception. The facts proved in this exception are fully stated in the opinion of this court. After all the evidence was closed the defendants asked the following instructions:

1st. If the jury find from the evidence, that the deed from Worley to Rogers was made with the view and for the purpose and intent to hinder, delay or defraud the creditors of Worley it is void, and plaintiff cannot recover.

2nd. If they find that Worley, on the 6th of June 1851, was unable to pay his debts and insolvent, and that on the 22nd of July 1854, he petitioned for the benefit of the insolvent laws; and at the time he made said deed he had no reasonable expectation from being exempt from execution or liability, for or on account of his debts, except by applying for the benefit of the insolvent laws, then the plaintiff is not entitled to recover, *provided* the jury believe that Rogers had notice of the insolvency of Worley.

3rd. That if they find that none of the goods so levied on by the officer were in the store of Worley on the 6th of June 1851, *in specie*, or in such manner as could be, by the defendant, Robinson, identified as those in the store on that day, and that other goods were introduced by Worley, with consent of the plaintiff, into the store since that day, and worked up with those in the store previously, and that said first mentioned goods were not pointed out to the officer by the plaintiff or any one for him, then the plaintiff is not entitled to recover against defendants in this form of action.

4th. If the jury find that the goods levied on by the officer, as stated in the evidence, were not in the store on the 6th of June 1851, *in specie*, or in the form in which they were at

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the time they were so seized on by the officer, or in such a manner as by him to be identified, and that all or most of the materials used in making them were purchased by Worley on his own credit, after the making of said deed, to wit, some time in 1854, then the plaintiff is not entitled to recover for any of said property except that in the store on the 6th of June 1851, and that the burthen of proof is on him to show that any goods for which he seeks to recover in this action were in the store at the time of making said deed.

5th. That said bill of sale conveyed no goods except those in the possession of Worley at the time of the making thereof, or such goods as he had some right or claim to at the time he executed it, and that any goods purchased by him afterwards are not affected thereby, and that before the plaintiff can recover he must show that the goods levied on were the property of Worley on the 6th of June 1851, or that he had some right or claim thereto on that day.

(The only evidence in the record to show that any of the goods levied on were in the store on the 6th of June 1851, is that of Dempsey, who states, "that some of the *buckles* used in the manufacturing of the goods so levied on *may have been* in the store on the 6th of June 1851; that the buckles used in making a trunk that would cost from $9 to $16 would cost from 12½ to 25 cents.")

The court granted the *first* prayer and refused all the others *as presented*, but granted the *fourth* with this modification added: "or that the goods supposed not to have been in the store at the time of the execution of said mortgage were purchased by the proceeds of sale of such goods as were in the store at said time." For the rejection of the *second prayer* the judge assigned as a reason, "that notwithstanding the jury might believe all that is stated in that prayer, the plaintiff might recover, as the only person who could set aside the deed because of the reasons stated in said prayer would be the trustee of the insolvent." The learned judge also assigned the following reasons for rejecting the *third* prayer as presented, and the *fourth* and *fifth* prayers:

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"There is so large an amount of property involved in transactions like the one now in question, and so many estates have been controlled in their distribution by instruments of similar import to the mortgage under consideration, that if I really doubted its validity I should be disposed to sustain the deed notwithstanding, and leave it to the Court of Appeals to determine at once the question, without affecting the community with protracted doubts upon an important usage. I feel, fortunately for myself, as much confidence in the decision I have made as a man should feel in a question upon which the profession is much divided, and courts of different countries have differed. The question is, whether this mortgage be void as to such goods as were brought into the store as 'renewals' or 'substitutions' of the original mortgaged stock, so far forth as the jury should find from the evidence such renewals or substitutions to have been made by the mortgagor with the proceeds of sale of the original mortgaged stock. It is contended, that at law no man can convey that to which he has no right, either 'actual' or 'potential.' The cases in 4 *Metcalf*, 306; 10 *Metcalf*, 488; 2 *Cushing*, 300; 7 *Adol. & Ellis N. S.*, 850; 1 *Man., Gran. & Scott*, 385, assert this as a common law principle, undoubtedly, but they do not apply the principle, if I understand those cases, to property acquired by the mortgagor with the consent of the mortgagee, and in conformity with the original agreement, by a reinvestment of the proceeds of the original mortgaged property. I will remark, moreover, that some doubt at least is thrown upon those cases, as to the abstract principle asserted by them as common law in Maryland, by the case of *Hannon vs. Robey*, 9 *Gill*, 440. The deed in that case was from a father to two sons, of one-half of such personal property as he might die possessed of. The court say, *page* 443, 'it is impossible to regard the deed as a testamentary paper.' After referring to 9 *Gill & Johns.*, 77, and 7 *Har. & Johns.*, 147, in answer to objections taken to the deed, as such, the court go on to say, *page* 446, 'nor do we find any authority to forbid the transfer of such personal property, *subsequently* acquired, as the grantor may leave at his death.' With a court of subordinate jurisdiction this case

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must exert great power, although in seeming opposition to those which I have just cited, whatever disposition the Court of Appeals may make of the question. For the matter now under discussion, this principle may be conceded against the case of *Hannon vs. Robey*. What I have to decide is, whether property, the proceeds of that originally and expressly mortgaged, acquired by barter or sale, with the consent of the mortgagee and in pursuance of the original agreement, can stand within the mortgage provisions. The cases cited in denial of this proposition concede, that there is no objection in law to the conveyance of 'a potential title,' as of growing crops, the future fleeces of a flock, of tithes, &c., &c. In Maryland it has been decided, that the offspring of a female slave held by the mortgagor, by agreement, and born before the right of possession was lost by the mortgagor, was bound to the mortgagee of the mother by the condition of the mortgage. If an analogy be conceded between these cases and the one now under adjudication, it is easy to harmonize the decisions referred to in support of the present mortgage with those adduced in opposition to it. Otherwise, I think there is to be found a conflict of judicial opinions difficult to reconcile, and embarrassing from the weight of authority on either side. I shall notice briefly now the cases which seem to me to declare affirmatively the principle involved in this enquiry. In 6 *Man. & Gra.*, 248, 249, two of the judges seem to me to intimate clearly, that had the covenants of the deed been such as those in the present case, and such as they supposed had been designed by the grantor, they should have been sustained. In 14 *Pick.*, 502, 505, a party made a pledge of property to secure a debt, and among other property, pledged such bricks as he then had made, and such as he should thereafter make in the prosecution of his business. He was to continue in possession of the property, with power to sell, &c. The lien of the creditors having the pledge was held good against other creditors. In *Cross on Liens*, a case is reported, (*Appendix*, 408,) the principles of which I cannot distinguish from those in the present controversy. A contractor agreed with his principals, that as a security for such advances as they should

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make him towards the completion of his undertaking, they should have a lien on the tools, materials, &c., that he then had or should thereafter place upon the described premises. He used the materials, removed them, replaced them by others, and altogether changed the elements of the security, yet the original agreement was held to bind all the property in the agreed predicament at the moment the contingency presented itself. In 20 *Maine*, 408, I find the court determining the question here involved, it seems to me precisely and without reserve, in support of the deed. In two cases, reported in 2 *Story's Rep.*, the late Judge Story sustained in equity liens created by agreement upon property not then owned by the mortgagor. The cases are *Fletcher vs. Morey*, 555, and *Mitchell vs. Winslow*, 630. These cases are supposed to decide such liens good in equity, but bad in law. I do not so understand them; on the contrary, I understand the distinguished judge to rule such agreements valid at law and equity, whenever it may be within the scope of a legal tribunal to enforce them: I refer more particularly to the case of *Mitchell vs. Winslow*, 630, of 2 *Story*. In the argument of his case, it is true the judge says he may admit all that is alleged against the deed at law, citing the common law principle asserted in the cases I have heretofore referred to, and that he may, for the sake of the argument, admit the deed bad at law, and still he proceeds to show that it might be, and was, good in equity. (See *pages* 636, 638.) In the further prosecution of his argument, however, I understand Judge Story to review this concession thus made, for the sake of the argument, and to deny its propriety. In *pages* 645, 646, &c., I understand him to say, that at law he can see no valid objection to this power to sell and to substitute other property for that specifically mortgaged; and in support of this position, he refers to the above cases in 14 *Pick.*, 20 *Maine*, and in the *Appendix of Cross on Liens*, as sustaining at law the principles for which he had been contending in equity. In Maryland, so far as I know, this case is undecided, whether in the Court of Appeals or in the subordinate tribunals. It has been but once, I believe, presented to the Court of Appeals, (in *Hudson vs. Warner* &

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Vance, 2 *Har. & Gill*, 428,) and then the court declined to decide the question. It has been decided in 9 *Gill*, 201, that an action for money had and received will lie in favor of the mortgagee against an assignee of the mortgagor for the benefit of his general creditors. Now, if the proceeds of the property be converted into money by the mortgagor with the consent of the mortgagee, and then, with like consent, invested in other property for the purposes of the mortgage, and the right and intention of this commutation of property be notified to all the world in the mortgage duly recorded, I cannot, I say, understand why, under such circumstances, the deed should not be capable of legal enforcement, supposing it to be free from other objections."

To each of these rulings adverse to them the defendants excepted and appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

P. M'Laughlin for the appellants.

After the defendants had shown that any property was purchased and placed in the store, after the execution of the mortgage, the burthen of proof then rested with the plaintiff, to show the particular goods affected by the mortgage. 1 *Starkie on Ev.*, 363. *Hudson vs. Warner & Vance*, 2 *H. & G.*, 416, 428.

The fifth prayer of the defendants is in reference to the power of Worley to assign by a present conveyance, goods in which he had no interest at the time of the making of the conveyance, and which then had no existence. Whatever may be the rule on this subject in courts of chancery, bankruptcy, and insolvency, it has been settled at law in England, from the earliest period to the present, without a single dissenting voice of which we have any knowledge, that the goods, the subject of the sale, must at the time have an existence, and that the vendor must have some interest therein. It is said in *Bac. Ab.*, *title Grant, D:* "A man cannot grant all the wool that shall grow upon his sheep that he shall buy afterwards,

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for there he hath it not actually or potentially." *Grantham vs. Hawley, Hob.*, 132, *Com. Dig., title Grant, D.* In *Lunn vs. Thornton*, 50 *Eng. C. L. Rep.*, 379, the same question was presented to the court, in an action of *trover*, by the assignor against the assignee. The goods were described in the deed, which was dated 4th August 1843, and the following words added: "Or which should, at any time thereafter, be in, upon or about his dwelling at Stoney Stratford, aforesaid." In the month of October following, under color of the deed, the assignee seized all the goods on the premises mentioned—part of which were not on the premises or in the plaintiff's possession at the time of the execution of the deed, but were afterwards acquired by the plaintiff, and were on the premises at the time of the seizure. *Tindall, C. J.*, says, (*page* 386:) "That the principle contention on the part of the plaintiff was, that the facts of the case brought it within the exception in Lord Bacon's rule: that the bringing of these goods on the premises of the plaintiff, where they were seized, at a time subsequent to the execution of the bill of sale, was the new act done by the plaintiff, which gave to the declaration contained in the bill of sale effect."—"The new act upon which Lord Bacon relies, appears in all the instances he puts, to be an act done by the grantor, for the avowed object and with the view of carrying the former grant into effect. Lord Bacon's language is: 'There must be some new act of conveyance to give life and vigor to the declaration precedent.'"

Very soon after the above decision, came, in 1845, the decision of the case of *Gale vs. Burnell*, 53 *Eng. C. L. Rep.*, 850, between the mortgagee and an execution creditor. The mortgage was made by Allen to Gale, on the 1st of January 1843, and after describing certain property, contains the following words: "And other things which are now, or which may at any time during the continuance of this security be, in and about the said premises, as his and their proper goods and chattels." After the condition there is this clause: "It shall be lawful for the said Gale, his, &c., peaceably and quietly to receive and take into his and their possession, and thenceforth to hold and enjoy all and every the said household goods,

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&c., and sell and dispose of the same and every part thereof," &c. *Lord Denman, C. J.*, (at *page* 861,) in pronouncing the judgment of the court, says: "We think it clear that this is a present conveyance from Allen to the plaintiff," &c. At *page* 862, he says: "We are of opinion," &c., "that the deed could not operate as an assignment of the goods to be brought upon the premises." See also *Robinson vs. Macdonell*, 5 *Maule & Selw.*, 228. From these and other authorities referred to by them, it is believed that this prayer contains the law on this subject as understood at the time of the American Revolution, and as understood and administered in England in courts of law up to the present time. And if so, the same law is binding on us. *Mayor & City Council vs. Williams*, 6 *Md. Rep.*, 235, 264, 265.

We shall now proceed to examine what is the settled rule, if any has been settled on this subject, in other States of this Union, for although the question has been twice presented in this State, there is no express adjudication of it. It came before the appellate court of Massachusetts in 1845, in the case of *Winslow vs. The Merchants Ins. Co.*, 4 *Met.*, 306, which was an action of *trover*, for a steam engine, two boilers and fixtures, a blowing cylinder pipe, a trip-hammer and fixtures. The facts of the case are, that Pond, on the 24th of May 1836, made a mortgage to the defendants of a lot of ground in Hawley street, which contained the following language: "With all and singular the machinery, tools, goods, chattels, and other property therein contained, together also with all the machinery, engines, tools, apparatus and other property, whether fixtures or otherwise, now being and remaining on the premises, and all such other machinery, engines, tools, and other property, as is now contemplated to be in said building," with a covenant to mortgage any other goods that might be placed therein. On the 18th October 1837, Pond gave the plaintiffs a mortgage, in which the mortgaged property was thus described: "All and singular the goods, wares, stock, iron, tools, manufactured articles and property of every description, being situated in or about the shop or building now occupied by me in Hawley street, in the city of Boston."

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Some of the goods which were taken by the defendants were placed in the house after the execution of the *first*, and before the execution of the *second* mortgage, and which were owned by the mortgagor at the time of making the first mortgage. The opinion of the court was delivered by *Shaw, C. J.* At *page* 316, he says: "Articles contemplated to be placed therein, without any schedule, enumeration or specification whatever, is a description far too indefinite and uncertain to constitute a lien on the articles afterwards to be placed in the building." And again the court says: "The stipulation of the mortgagor to execute other instruments of hypothecation when the articles should be put in and made certain, was a good executory contract, binding on the contractor personally, and for a breach of which he might have been liable in damages, but not an executed contract constituting a lien, *de facto*, upon articles not then bound by the mortgage." The same question came before the court again, at October term 1845, in the case of *Jones vs. Richardson*, 10 *Met.*, 481. Action of *assumpsit* on an award. The plaintiff was deputy sheriff, and levied on certain goods as those of Addison Richardson, at the suit of several of his creditors, and delivered the goods so levied on to the defendant for safe keeping; on demand the defendant refused to return them, but claimed them under a mortgage from Richardson, dated September 7th, 1842, in which the goods mortgaged were described as: "The whole stock in trade of said Addison, as well as each and every of the merchandise which the said Addison this day bought of Timothy Walker, constituting said Addison's stock in trade, in the shape the same is and may become in the usual course of the said Addison's trade and business as a trader." In October term 1846, *Wilde, C. J.*, delivered the opinion of the court, and, at *page* 487, says: "Only a part of the goods was owned by the mortgagor until after he made the mortgage." At *page* 488, the court says: "That a person cannot grant or mortgage property of which he is not possessed, and to which he has no title, is a maxim of the law too plain to need illustration: a man cannot grant or charge that which he hath not." At *page* 493, the court says: "That by the Rev. Stat., ch. 74, sec. 5, it is enacted,"

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&c. This act is almost *verbatim* with our act of 1729, ch. 8, sec. 5, and then says: "Now it is clear, we think, that the record of the mortgage is no sufficient notice of a legal incumbrance as to subsequently acquired property, because, by law, no such property could be sold or conveyed thereby; and it could furnish no notice that any property would be afterwards purchased, or if purchased, that any act would be done to ratify the grant in that respect; as to such property, therefore, the mortgage could not be valid."

This point came before the same court for adjudication in October term 1848, in the case of *Barnard vs. Eaton*, 2 *Cushing*, 294. This was a case of the mortgagee against the assignee of the insolvent, on a petition praying that the mortgaged property might be sold, and the proceeds applied to the payment of his debt, and that he might be admitted as a creditor for the deficiency. The mortgage describes the property mortgaged as, "All and singular the goods, wares and merchandise, consisting of dry goods, crockery, hardware, groceries, provisions, &c., then in the store occupied by the mortgagor in South Reading, and also, all the goods which then were, or might be afterward, substituted for those the mortgagor then possessed." The opinion of the court is delivered by *Shaw, C. J.* At *page* 303, he says: "A mortgage is a present transfer of title, although conditioned and defeasible; it can therefore only bind the property capable of being identified at the time it is made, and whatever may be the agreement of the parties, it cannot bind property afterwards to be acquired by the mortgagor." Again the court says: "If therefore at the time when this claim was made none of the goods were capable of being identified, the *mortgage must fail*, not because it was void in its *origin*, but because there is no subject to which it can now apply."

There can be no parol ratification of an instrument under seal. *Stetson vs. Patten*, 2 *Greenlf.*, 359. An execution creditor stands in the same position as a purchaser. *Divver, et al., vs. McLaughlin*, 2 *Wend.*, 596. In 2 *Kent*, 468, it is laid down that the thing sold must have an actual or potential existence, and be specific or identified, and capable of being delivered.

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See also *Story on Sales, sec.* 184. In 2 *Story Eq., sec.* 1040, it is said: "To make an assignment valid at law, the thing which is the subject of it must have an actual or potential existence at the time of the grant or assignment." See also *McCarty vs. Blevins*, 5 *Yerger*, 195. *Forman vs. Proctor*, 9 *B. Monroe*, 124.

The learned judge who decided this case in the Court of Common Pleas, referred to several authorities which he supposed supported the view of the law of the case as taken by him, upon which we desire to remark, that the case in 9 *Gill*, 440, was decided upon the view of the peculiar position in which parties to the deed *stood to each other*. The reasoning of the court, at *page* 444, would lead to the conclusion, that the deed in that case would not be sustained, situated as this is. The question as to the effect of the mortgage on property to be acquired in future, did not rise in the case in 6 *Man. & Gran.*, 248. In the case in 14 *Pick.*, 502, the mortgagor owned the clay from which the brick were to be made, therefore it differs entirely from the case at bar, and is within the rule laid down in *Bacon's Abr.* and *Com. Digest*. The case referred to in *Cross on Liens*, is a case in bankruptcy, as is also the case in 2 *Story's Rep*. The case in 20 *Maine* would appear to support the judge's view, but there is a case, in 21 *Maine*, 86, *Goodenow vs. Dunn*, in direct opposition to the view taken by the judge, of the law laid down in 20 *Maine*. The case referred to, of the offspring of the slave, was decided on the principle, that the natural increase of property, mortgaged or sold, belongs to the mortgagee or vendee, and is foreign to this question. The case in 9 *Gill*, 201, merely decides the familiar principle, that a party against whom a tort has been committed, in the taking and selling of his goods, may waive the tort, and sue for the proceeds of the sale.

Coleman Yellott for the appellee, argued, that the mortgage was valid and operative to pass the subsequently acquired goods. He cited the cases and relied upon the argument of the court below as presenting the true view of the authorities, and insisted that the rigid rules of the common law upon this

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point must yield to commercial usage and convenience of modern times.

LE GRAND, C. J., delivered the opinion of this court.

This is an action of trespass *vi et armis*, and involves a question of very great importance. It arises in the following manner:—one Joseph D. Worley of Baltimore city, purchased of Charles Rogers, the appellee, a stock of goods for $5314.80, and on the same day executed a mortgage bill of sale on said stock to secure payment of the purchase money in ten days. The mortgage, in addition to the usual provisions, contained also the following: "together with all *renewals* and *substitutions* for the same, or any part or parts thereof: the object of this conveyance being to include, not only the articles at present in said stores, *but whatever may be at any time therein*, in the course of said Worley's business."

Worley remained in possession until July 22nd, 1853, when he applied for the benefit of the insolvent laws, the mortgage to Rogers remaining due and unpaid. On the 8th of July 1854, the appellant, Hamilton, having a judgment against Worley, caused a *fi. fa.* to be levied upon the stock of goods then in Worley's possession; and Robinson, the other appellant, by virtue of this *fi. fa.*, as constable, seized and removed a portion of said stock. On the 18th of July, the appellee instituted his action of trespass *vi et armis* against the appellants to recover damages for the seizure of said goods.

Worley was examined as a witness, and on cross-examination testified—when speaking of the goods in the store at the time of the seizure by Robinson—"that all the goods were manufactured and placed in the store within six months previous to the time on which they were so taken; that the most of the materials from which they were manufactured were purchased by him after the making of said deed; that the materials thus manufactured were nearly all purchased with the proceeds of the sales of goods in the store at the time of making said deed." It was also proved by another witness, named Dempsey, "that the said goods so levied on were all manufactured within six months previous to the making of the

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levy; that the materials from which they were made, except the buckles, were purchased since the 6th of June 1851."

The important and practical question suggested by this state of case is, does such a clause, in a mortgage of goods and chattels, as that recited, give, at law, a right of action to the mortgagee against any one interfering with the goods acquired by the mortgagor *subsequently* to the execution of the mortgage? The question was considered but not decided by the Court of Appeals in *Hudson vs. Warner & Vance*, 2 *Harr. & Gill*, 428, and in *Preston & Hepburn vs. Leighton*, 6 *Md. Rep.*, 98. It is evident, however, from his opinion, to be found in the record, that the learned judge who decided it below, in this case, gave to it the attention which its importance demanded. Differing from him in opinion, it is proper we should indicate the grounds of that difference, as well by a reference to the authorities on which he relied as to others.

It is laid down in *Comyn's Digest, tit. Grant D*, that "a man cannot grant a thing which he has not." So in *Bacon's Abr., tit. Grant D*, "a man cannot grant all the wool that shall grow upon his sheep that he shall buy afterwards, for there he hath it not actually or potentially." The thing sold must have an actual or potential existence. 2 *Kent*, 468.

And *Story* in 2 *Equity Jurisprudence, section* 1040, says, "to make an assignment valid at law, the thing which is the subject of it, must have an actual or potential existence at the time of the grant or assignment." The learned judge concedes that the cases in 4*th Metcalf*, 306; 10*th Metcalf*, 488; 2 *Cushing*, 300; 7*th Adolphus & Ellis N. S.*, 850; 1*st Manning, Granger & Scott*, 385, assert this to be the common law principle, but they do not, in his opinion, apply the principle to property acquired by the mortgagor with the consent of the mortgagee, and in conformity with the original agreement by a re-investment of the proceeds of the original property.

It should be observed, that there is not any evidence in the record that the proceeds of the property in the store, at the date of the mortgage, were invested in the goods levied upon by the appellants, by the mortgagor with the avowed object of benefitting the mortgagee.

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This fact, in a certain aspect of the case in view of some of the decisions, might have some influence. The rights of the appellee depend entirely upon the language of his deed.

It is suggested, that two of the judges in the case of *Tapfield vs. Hillman, et al.*, 6 *Manning & Granger*, 245, intimate clearly, that had the covenants of the deed been such as those in the present case, and such as they supposed had been designed by the grantor, they should have been sustained. That was the case of an assignment, by way of mortgage, (to secure the payment of a sum of money loaned,) from a lessee to his lessor, of furniture and stock in trade, in, about, upon and belonging to an inn, with a power, upon non-payment, to enter into, possess, hold and enjoy, the inn for the residue of the assignor's term therein, and "to take, possess, hold and enjoy, all the goods, chattels, effects and premises." On the day before the expiration of the plaintiff's tenancy the mortgagees entered upon the premises, under color of the mortgage deed, and seized the whole of the effects, including stock in trade and other property which were *not on the premises at the date of the deed.*

As we understand the language of the judges, their purpose in the particular case was to interpret the words actually used in the mortgage, and in the view they had of it, it was wholly unimportant to inquire whether or not, at law, goods subsequently acquired by the mortgagor could be made liable by any words which might have been inserted in the deed. It is true, Tindall, Ch. J., says, that "if the intention of the parties was, that the security should extend to subsequently acquired property, that intention ought to have been clearly expressed;" and also, "that it would have been very easy to have so framed the power of entry as to make it extend to all effects upon the premises at the time that such power should be enforced, had such been the intention of the parties." The court were of the opinion that the *language* of the deed only covered the effects upon the premises at the time of its date, and it was not therefore required of them to deal with the question involved in the case before us. Indeed the counsel engaged did not press it, the only allusion in the argument to

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it was, that "it was far from being clear, that an assignment *can* be made to comprise property which is not in existence at the time." "*But that point*" did "not arise," for the deed did not profess, neither did "it convey the slightest intimation, that the parties meant to include property which might be subsequently acquired." Looking at the facts of the case as presented by the report, we incline to ascribe the language which we have quoted, from Tindall, Ch. J., to a desire to show that the words of the deed did not, nor was it intended they should, cover subsequently acquired property. If this were so there was no necessity to inquire into the law applicable to the other question. The case was decided in 1843. At Hilary term 1845, the case of *Lunn vs. Thornton*, 1 *Manning, Granger & Scott*, 379, was decided. In the course of the argument the expressions we have cited from the case of *Tapfield vs. Hillman*, were declared to be extra-judicial. The deed in *Lunn vs. Thornton* not only covered the effects on the premises at the time of its execution, but also all "*which should at any time thereafter remain and be*" *thereon*. The case was very fully and ably argued by counsel, and decided by Tindall, Ch. J., after a thorough review of the cases and principles applicable to it. He distinctly holds, that subsequently acquired goods are not covered by such a deed. He thus plainly states the facts and the question arising out of them:— "the goods," says he, "in dispute, were not goods 'remaining and being on the premises' at the time of the execution of the deed of bargain and sale, but were goods which had become the property of the plaintiff, and had also been brought upon the premises subsequently to the execution of that instrument, and were remaining thereon at the time of the seizure under the bill of sale. Under these circumstances, it was contended by the defendant's counsel, that the bill of sale covered these goods as being goods remaining and being in or upon the dwelling-house at the time of the seizure; and the question is, whether the property in these goods passed under this bill of sale. It is not a question whether a deed might not have been so framed as to have given the defendant a *power of seizing* the future personal goods of the plaintiff as they should

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be acquired by him, and brought on the premises in satisfaction of the debt; but the question before us arises on a plea which puts in issue the property in the goods and nothing else; and it amounts to this, *whether, by law, a deed of bargain sale of goods can pass the property in goods which are not in existence, or at all events which are not belonging to the grantor at the time of executing the deed.*" This he resolves in the negative, especially where nothing has been done by the grantor *other than the acquisition of goods.* He quotes from *Bacon's Maxims, Reg.* 14: "*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu;*" (although the grant of a future interest is invalid, yet a declaration precedent may be made which will take effect on the intervention of some new act;) and then says, that Lord Bacon adopts the first branch of the maxim, namely, that a disposition of after-acquired property is altogether inoperative, a proposition of law that is to be considered as beyond dispute; and only labors to establish the second branch of the maxim, namely, that such disposition may be considered as a declaration precedent, which derives its effect from some new act of the party after the property is acquired. The defendant contended, that the facts of the case brought it within the exception in Lord Bacon's rule; that the bringing of the goods on the premises of the plaintiff, where they were seized, was the new act done by the plaintiff, which gave the declaration contained in the previous bill of sale, its effect. In reply to this view the court say, "the new act which Bacon relies upon appears, in all the instances which he puts, to be an act done by the grantor for the *avowed object* and *with the view* of carrying the former grant or disposition into effect." He quotes Lord Bacon thus: "there must be some new act or conveyance, to give life and vigor to the declaration precedent;" and then adds, "which evidently imports more than the simple acquisition of the property at a subsequent time, which, if sufficient, would render the rule itself altogether inoperative; but points at some new act to be done by the grantor in furtherance of the original disposition." After this decision, and that of *Gale vs. Burnell, 7 Adolphus*

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& Ellis, N. S., 862, which is in strict conformity with it, the *dictum* in the case of *Tapfield vs. Hillman*, if supposed to be in conflict, ought, on the point now before us, to have but little influence.

It is supposed, however, that Justice Story, in two cases to be found in 2 *Story's Rep.*, that of *Fletcher vs. Morey*, at 555, and that of *Mitchell vs. Winslow*, at 630, intimates, if he does not in fact distinctly hold, that such deeds are good and valid both at law and in equity. We do not so understand him. Both those cases were in equity, and the whole reasoning of the judge was to show, that whatever might be the rule at law, nevertheless equity will attach its jurisdiction wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not; or if personal property, whether it is *in esse* or not; that it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy. With this doctrine we have nothing to do in the present instance. This is a case at law, and if we correctly comprehend the distinguished jurist, he plainly announces his concurrence with the views we have already expressed. At *page* 638 of the report of the case of *Mitchell vs. Winslow, et al.*, 2 *Story's Rep.*, he says, "it may be admitted to be true, *what, indeed, seems to be the result of the authorities cited at the bar, as well as of others equally entitled to respect*, that to make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment, and that a mere possibility is not assignable." Again, in drawing the distinction between law and equity he remarks, "courts of equity do not, like courts of law, *confine* themselves to the giving of effect to assignments of rights and interests, which are absolutely fixed *in esse*. On the contrary, they support assignments, not only of *choses in action*, but of contingent interests and expectancies, and also of things which have no present actual or potential existence, but rest in mere possibility only."

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The case of *Macomber vs. Parker*, 14 *Pickering* 497, was decided on a principle in no manner involved in this case. The plaintiffs there were the owners of the yard and clay of which the bricks were made. So soon as the bricks were manufactured they were placed in the kilns of the plaintiffs, in other words, *delivered to them*, and in pursuance of the terms of the contract between the parties, *eo instanti*, their lien attached. The court say: "Now we hold it to be clear, that the plaintiffs had a right to retain Evans' part of the bricks under this contract. It was expressly agreed by Evans that they should have such a right. * * * * *Every brick, as it was formed, may well be considered as delivered to the plaintiffs in part execution of the contract.*"

Looking to the maxims of the common law and the decisions of courts, both in this country and in England, we are clearly of the opinion, that this action cannot be maintained for the taking of the subsequently acquired goods. If, for the convenience of the community, or for the benefit of trade and commerce, it be deemed important that the rules of law in this particular should be altered, the legislature is the proper branch of the government to which application should be made for that purpose. As the law now is, there can scarcely be a doubt that in some instances loss and injury are suffered by those who are least deserving of it. Courts cannot prevent it, for the rules of law are, and have been from the earliest times, inexorable.

The views we have expressed, it is supposed, are apparently in conflict with some of those announced in the opinion of the court in the case of *Hannon's Exc'rs vs. The State, use of Robey*, 9 *Gill*, 440. That case may be maintained without disturbing the doctrine we have laid down. The part of the opinion which relates to the question supposed to be involved in this case is very brief indeed; but it is not unreasonable to suppose, that it was decided on a principle of analogy to the doctrine of estoppel, which makes the act of the ancestor conclusive upon the heir. We do not consider the case as going any farther, or as intended to overrule the decisions to which we have referred.

The second prayer was well rejected, because there was

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no evidence from which the jury could have found the facts averred as the ground-work of that instruction. More than three years had elapsed between the date of the deed and the time of Worley's application; and he states expressly,—which is all the evidence on the question,—that he then expected to pay all his debts from his business, which was large and profitable, and that he did pay a large portion of them.

For the reasons already stated, we think the court erred in rejecting the third, fourth and fifth prayers of the defendants. It was essential to the right of recovery of the plaintiff, that he should prove the goods seized were on the premises at the time of the execution of the mortgage. The only evidence applicable to this view of the case relates to the "buckles" used in the manufacture of trunks, &c. On the proof *in this record*, the recovery of the plaintiff would be limited to their value; and to enable him to recover even to that extent, it was incumbent upon him to show that they were known to the defendants to have been on the premises at the date of the mortgage, or were, as such, pointed out by him to the officer. *Shumway, et al., vs. Rutter*, 8 *Pick.*, 443. No such evidence was offered at the trial. Besides, if the property of the plaintiff was commingled with that of Worley, it must be taken as having been done with his permission, for he allowed the goods to remain in the possession of Worley and under his control, *with the knowledge that it was his purpose to use it in the manufacture of other articles.*

The officer was bound to take the property of the debtor, and if, by the permissive act of the mortgagee, the property of the latter was so intermixed with that of Worley as to prevent separation or identification, the rights of *third* parties ought not to be affected thereby, whatever might be the influence of such commingling as between the original owners.

In what we have said, we are, of course, to be understood as speaking only of cases similar to the one now before us. Where personal property, animate in its nature—such as a female slave—is disposed of, the fate of the mother determines that of the child—*partus sequitur ventrem.*

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These views dispose of the case, and it is not, therefore, necessary to consider the sufficiency of the releases offered in evidence.

Judgment reversed and procedendo refused.

William Brown *vs.* Robert Gilmor's Exc'rs, and others.

The act of 1853, ch. 123, is a legitimate exercise by the legislature of the power conferred by the 23rd section of the 4th article of the constitution, in reference to the removal to the counties of the cases in the Court of Chancery.

The ratification of a chancery sale is *final* and *conclusive* unless irregularly made by the court, or unless the purchaser was prevented by misrepresentation, surprise or fraud, resulting from some act or conduct of the trustee or interested parties, from making his objections in due time.

The passage of an order of ratification *nisi* is not originating *new business*, but the mere continuation of an old proceeding, and it is no objection to such an order that it fixed a day for the final ratification *after* the Court of Chancery would cease to exist.

The jurisdiction of the Court of Chancery to pass such orders in pending cases was never suspended until the court itself expired, and then its jurisdiction passed to and continued in the court to which the case was removed, as if no removal had taken place.

From the passage of the order *nisi* to that of removal, the proper place to file objections to the sale was in the Court of Chancery, and *after* the removal they should be filed in the court to which the case is removed.

The order for removal transfers the jurisdiction, and from that moment the case, in legal contemplation, is in the court to which it is removed, whether the *papers* have actually been transmitted from one court to the other or not.

After the order for removal was passed the register in chancery had no power to receive any paper to be filed in the case.

An order *nisi* was passed by the chancellor, and the case was then removed to the Superior Court of Baltimore city, which passed the final order of ratification. Held, that this is final and conclusive in the absence of misrepresentation, surprise or fraud, on the part of the trustee or other interested parties.

Appeal from the Equity Side of the Superior Court of Baltimore city.

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The appellant was the purchaser at trustee's sale of a tract of land, and took this appeal from an order of the court below, (FRICK, J.,) dismissing his petition and refusing to open the final order of ratification of sale. The facts of the case are sufficiently stated in the opinion of this court.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

Neilson Poe for the appellant, argued, that the passing of the order of ratification was, under the circumstances, a *surprise* upon the appellant, and that he was not concluded by it. The chancellor had no right to set the case down *for hearing* at a day after that on which, by the organic law of the State, his office expired. Under the provisions of the constitution the Court of Chancery ceased to exist on the 10th of March 1854, and yet the chancellor fixed the day for the final ratification of this sale on the 6*th of April* 1854, nearly one month after his office expired. The order of *removal* does not help the case, because the party asking it never took any proceeding under it, and though passed on the 8th of March 1854, the papers were not removed to the Superior Court of Baltimore city until the 12th of April 1854, only four days before the final order of ratification was passed. Where then was the appellant to file his objections? The Court of Chancery existed but little more than one month after the order of ratification *nisi* was passed. After that time he could not file his exceptions in the Court of Chancery. He could not file them in the Superior Court before the 8th of April, because the papers were not until that day transmitted to that court. The whole time therefore between the 10th of March and the 8th of April was lost to the appellant, for the purpose of filing his exceptions, and yet the law and the language of the order contemplates, that he should have *all the time* between the order *nisi* and the final ratification within which to show cause against the sale. Of this the appellant here was deprived without fault or laches on his part, and we therefore insist that the ratification was a *surprise* upon him.

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John Spear Nicholas and *Jonathan Meredith* for the appellees, argued, that the appellant has no just cause to complain of surprise in the passing of the order of ratification. The general rule is, that a *ratified sale* is conclusive upon the purchaser unless irregularly ratified by the court, or unless the purchaser was prevented by misrepresentation, surprise or fraud, resulting from some act or conduct on the part of the trustee, or those interested in the proceedings, from making his objections in due time. The only one of these grounds relied on here is that of *surprise* under the circumstances of the passage of the order of ratification. The chancellor had the right to pass the order *nisi* limiting the time for the final ratification. It was not *new business*, but a regular and necessary proceeding in a pending case. The constitution and the act of 1853, ch. 123, had provided for the removal of the chancery papers. The order of removal in this case was passed in strict conformity with this law, and *immediately* after its passage the Superior Court had jurisdiction of the case. There was no cessation or suspension of jurisdiction, but it was *continuing* for the entire period intervening between the order *nisi* and the final order of ratification. From the date of the order *nisi* to that of removal he could file his objections in the Chancery Court, and *after* the order of removal he could file them in the Superior Court, whether the papers were actually removed to that court or not, yet during all this time, and though he had full notice of all the proceedings, he yet takes no steps to file the objections he now sets up. We insist, therefore, that the final order of ratification is *conclusive* upon this party and ought not to be opened.

(The argument upon the merits of the objections made by the petition, and attempted to be sustained by proof, is omitted, as the case was decided *solely* upon the ground argued above.)

Mason, J., delivered the opinion of this court.

On the 28th of October 1853, Jonathan Meredith and John Spear Nichols, Esq'rs., trustees, under a decree of the High Court of Chancery, in the case of *Gilmor's Executors vs. Brien's Executors, & others*, offered at public sale on the

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premises, in Washington county, amongst other property, a tract of land described in the advertisement thereof, "designated on the plat as 'the Summer-House Farm,' *containing about six hundred and eighteen acres*, and improved by a dwelling house and other buildings." William Brown, the present appellant, became the purchaser thereof, at $10 per acre.

The sale, with others made at the same time, was reported to the Hight Court of Chancery, and on the 6th of February 1854, that court passed the usual provisional order for the ratification of the sale, unless cause should be shown to the contrary, *on or before the 6th day of April* 1854.

On the 8th of March 1854, an order was passed by the chancellor, on the application of the present appellees, for the removal of the cause from the High Court of Chancery to the Superior Court for the city of Baltimore; and it is agreed between the counsel in this cause, although the record does not disclose the fact, that the papers in the said cause were not transmitted to the Superior Court until the 8th of April 1854, when the cause was first docketed in that court.

On the 12th day of April 1854, *four days after the actual transmission of the papers in the cause*, the sale to Brown was finally ratified by the Superior Court.

On the 12th of May 1854, the appellant filed his petition in the Superior Court, setting forth a number of reasons why the sale should be set aside and himself released from the obligation of complying therewith, and concludes with the prayer, *that the final order of ratification might be opened*, that the trustees answer the petition, &c. The petition further alleges, and it is not denied, that on the day *after* the order for the removal of the cause was passed, and while the papers were still in the chancery court, the appellant applied to the register to receive objections to the ratification of the sale, but the register *refused to receive or file his petition.*

The trustees answered the petition, and proof was taken in support of its allegations. Upon final hearing the court below dismissed the petition, from which decree this appeal was taken.

Under the 4th art. and 23rd sec. of the constitution, the

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Court of Chancery ceased to exist on the 10th day of March 1854. The same section provides, "that no new business shall originate in said court after the ratification of the constitution," which was on the first Wednesday of June 1851; and that the legislature should provide for the removal of undisposed of cases to the counties and city of Baltimore, "in such manner and under such regulations as may be deemed necessary and proper."

In pursuance of this last provision, the legislature passed the act of 1853, ch. 123. It was conceded by the counsel upon both sides, that the order of the chancellor of the 8th of March, providing for the removal of the cause to the Superior Court, was in strict compliance with the act of Assembly; and this court is of opinion, that the act itself was a legitimate exercise by the legislature of the power conferred by the constitution.

The case thus made presents two questions for this court to determine: the first is, whether the ratification of the sale was final and conclusive, in view of the circumstances under which it was made? and if not, then secondly, whether the appellant has made such a case upon his petition and proof as to entitle him to the relief prayed?

Public policy and justice to parties interested require, that the ratification of judicial sales by courts having jurisdiction over the same should be final and conclusive, unless irregularly made by the court, or unless the purchaser was prevented by misrepresentation, surprise or fraud, from making his objection to the ratification in due time; and it must further appear, that such misrepresentation, surprise or fraud, resulted from some act or conduct upon the part of the trustees, or on the part of those interested in the proceedings.

The conclusiveness of this order of ratification is first assailed, upon the ground, that the conditional or provisional order, passed on the 6th of February, was irregular, because it fixed a period for the final ratification, (viz., 6th of April,) beyond that at which, under the constitution, the existence of the Court of Chancery was to terminate.

This objection is not tenable. The passage of this order was not *originating new business*, but the mere continuation

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of an old proceeding. The jurisdiction of the Court of Chancery to pass such orders in pending cases was never suspended until the expiration of the existence of the court, and then its jurisdiction passed to, and continued in, the court to which the case was removed, as if no removal had taken place. Therefore, from the time of the passage of the order of ratification *nisi* until the order passed for the removal of the cause to the Superior Court, the proper place for filing objections to the sale would have been in the chancery court: after that time, the objections should have been filed in the Superior Court, which court received the case, and all its pending or unexecuted orders, in the same condition in which they were when the removal was ordered. For the purpose of giving the Superior Court complete control over the case, it was not necessary that the papers should have been actually transmitted from the one court to the other. The *order* for the removal transferred the jurisdiction, and from that moment, in legal contemplation, the case was in the Superior Court. If this were not the true view of the subject, the proceedings might be suspended for an indefinite time between the two courts, a condition of things never contemplated by the constitution and laws. Besides, it is to be remembered, that the papers were actually in the Superior Court *four days* before the final ratification was made.

Nor had the register in chancery, after the order for removing the case had passed, any power to receive any paper to be filed in the cause, and therefore he was right in refusing to receive or file the appellant's petition.

Unless, therefore, there was some other cause which prevented the purchaser from making his objections to the ratification of the sale within the time limited by the order *nisi*, such as misrepresentation, surprise, or fraud, on the part of the trustees or other parties interested, the ratification by the Superior Court of Baltimore must be regarded as final and conclusive. No such cause or reason has been urged, nor can we discover any ground for any such allegation.

The view thus expressed dispenses with the necessity of considering the second question, namely, whether the appel-

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lant has made such a case, by his petition and proof, as calls for the interposition of this court. However meritorious his grounds of objection to the sale may be, having suffered the time fixed by the court to elapse within which those objections were to be presented, he cannot now open a proceeding which, by his own laches, has been suffered to ripen into a final and conclusive decree.

Decree affirmed, with costs.

CHARLES CARROLL *vs* ROBERT O. RIDGAWAY.

Where testimony is offered for *several* purposes and is admissible for any *one* of them a *general* objection to it will not be sustained, such an offer being regarded as a *general* offer.

Where a defendant, speaking in relation to the services of the plaintiff about a certain mill, said, "that as the mill had turned out unprofitably he thought plaintiff would not charge him anything, and that he did not think his charge ought to be more than at the rate at which plaintiff's brother had charged," it is a sufficient admission to relieve the claim for such services from the bar of the statute of limitations.

Where a book in the handwriting of the plaintiff, purporting to contain an account between the parties, was produced by defendant, in pursuance of notice served on him by the plaintiff, the former is entitled to use it in evidence as any other memorandum of the plaintiff relating to their dealings.

A prayer that a claim is barred by limitations unless the jury find an assumption or promise by defendant within three years before bringing suit for the services rendered, correctly announces the law and should be granted.

APPEAL from the Circuit Court for Anne Arundel county.

Assumpsit by the appellee against the appellant for services rendered and money advanced, laid out and expended, at defendant's request. On demand a bill of particulars was furnished and filed. Pleas, *non assumpsit* and *limitations*.

1*st Exception*. The plaintiff after giving evidence of the services rendered by him to the defendant at Poplar Island, offered the testimony of William S. Ridgaway in regard to the admissions of the plaintiff, which is fully set out in the opinion of this court. The defendant then offered the testimony of

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Sherwood and the other proof stated in the opinion of this court. The plaintiff then offered in evidencc a letter from defendant to plaintiff, dated the 1st of February 1847, for the purpose of rebutting the evidence of Sherwood as to the admission of the plaintiff touching the indebtedness of $200, and for the purpose of corroborating the testimony of William S. Ridgaway, that said admission of the plaintiff, proved by Sherwood, was in reference to a balance of rent due for the year 1846. (The contents of this letter are sufficiently stated in the opinion of this court.) To the admissibility of this letter for said purpose the defendant objected, but the court, (BREWER, J.,) overruled the objection and permitted the letter to be read to the jury. To this ruling defendant excepted.

2nd Exception. Upon the evidence thus offered the defendant offered his *first* prayer, that if the jury find that plaintiff rendered the services in the account in this case more than three years before bringing this suit he is not entitled to recover, though they may find that defendant said to William S. Ridgaway in June 1850, that as the mill turned out unprofitably he thought Robert, (the plaintiff,) would not charge any thing; that if the mill had turned out profitably, he, (defendant,) would have been willing to pay a good salary; he thought that Robert's charge ought not to be more than $300; that he would not be willing to pay Robert more than the rate allowed to Socrates. This prayer the court rejected and defendant excepted.

3rd Exception. In addition to the testimony of Ridgaway contained in the first exception, this witness,, upon his examination-in-chief, stated that defendant said "that as the mill turned out unprofitably he thought Robert, (the plaintiff,) would not charge him anything, but if the mill had turned out profitably, he, (defendant,) would have been willing to pay a large salary, but if Robert, (the plaintiff,) was entitled to anything he ought not to charge more than was allowed to Socrates Ridgaway for his services, which was at the rate of $300 per year, and that he, (defendant,) would not be willing to allow more than that rate." After the witness had given his testimony, as above stated, he corrected it by saying that defend-

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ant's declaration was, as it is stated in defendant's first prayer.

The defendant then offered the following additional prayers:

2nd. (This prayer is the same as that contained in the second exception.)

3rd. That there is no evidence in this case to take it out of of the statute of limitations, except so far as services in relation to the saw-mill are concerned.

4th. If the jury find that the services sued for in this case were rendered by plaintiff to defendant more than three years before the bringing of this suit, then he is not entitled, under the pleadings, to recover for such services, unless they further find from the evidence, an assumption or promise by the defendant, within three years before the bringing of this suit, to pay for said services.

5th. If the jury find, that in June 1850, defendant said to William S. Ridgaway as *first stated* by this witness, and as is set out in the commencement of this exception, then such declaration or admission by defendant is not sufficient to remove the bar of the statute of limitations.

The court rejected each of these prayers and to this ruling the defendant excepted.

4th Exception. Under notice given by the plaintiff to defendant to produce all the accounts and vouchers furnished to defendant by the plaintiff, defendant at the trial produced and delivered to the plaintiff's counsel the accounts referred to in the first exception, and also a little book marked C, containing accounts. The plaintiff's counsel took this book, and after examining it presented it to William S. Ridgaway, a witness for the plaintiff, then under examination, and asked him if this book and the account therein were the same that he saw in the possession of defendant in June 1850. The witness answered that it was not, that though the account which he saw was in a book, it was a larger book and did not contain more than one account; that the entries in this book were in the handwriting of the plaintiff. The defendant then offered to read said book and account as evidence to the jury. To this the plaintiff objected, which objection the court sustained, and the defendant excepted, and the verdict and judgment being against him, appealed.

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The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

Charles H. Pitts for the appellant, argued:

1st. As to the question of *limitations:* The declaration and statement of defendant, as proved by William S. Ridgaway, did not amount to an admission of a present subsisting debt, and was not sufficient to remove the bar of the statute. 1 *H. & G.*, 204, *Oliver vs. Gray.* 4 *G. & J.*, 509, *Frey vs. Kirk.* 1 *Gill*, 172, *Duvall vs. Peach.* There must be a promise, or an acknowledgment such as to imply a promise, of a subsisting debt. "*If he is entitled to anything*," is not an admission of a debt; it does not come within the rules laid down in the cases of *Oliver vs. Grey* and *Frey vs. Kirk.* But conceding that the testimony, if believed by the jury, was sufficient to remove the bar of the statute, still there can be no objection to our fourth prayer, and it should have been granted.

2nd. As to the *admissibility of the letter:* The letter was offered for *two specified purposes*, and if inadmissible for *those purposes* it should have been rejected, though it might have been admissible *generally.* 5 *Md. Rep.*, 211, *Keller vs. Donnelly.* 6 *G. & J.*, 487, *Goodhand vs. Benton.* 3 *Do.*, 435, *Sothoron vs. Weems.* Now there was nothing in this letter, as we understand it, which either rebutted the testimony of Sherwood or corroborated that of William S. Ridgaway. Not being admissible for these purposes, and not having been offered generally, it should have been rejected.

3rd. As to the admissibility of the book C: It was in the handwriting of the plaintiff and was produced under notice from him, and was examined by his counsel and produced to a witness on the stand. Papers produced under notice are made evidence for both parties, if the party calling for them examines them so as to become acquainted with their contents. 2 *Tidd*, 804. *Evans' Pr.*, 293. 1 *Greenlf. on Ev.*, *sec.* 593, and cases there cited. 2 *Wash. C. C. Rep.*, 482, *Jordan vs. Wilkins.* 1 *Cushing*, 33, *Commonwealth vs. Davidson.* 16 *Maine*, 225, *Penob. Boom. Corp. vs. Lamson.* 8 *Smedes &*

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Mar., 362, *Anderson vs. Root.* 7 *Gar. & Payne*, 386, *Calvert vs. Flower.* 1 *Harrington*, 233, *Randel vs. Ches. & Del. Canal Co.*

William H. G. Dorsey and *Thomas G. Pratt* for the appellee, argued:

1st. As to *limitations:* The admissions of the defendant, as proved by the witness, William S. Ridgaway, were sufficient to remove the bar of the statute. Where a party *admits* an indebtedness, or the rendition of services, it takes the case out of the statute, unless he states an excuse which, *if true*, would exonerate him. 2 *G. & J.*, 301, *Keplinger vs. Griffith.* 7 *Gill*, 44, *Carter vs. Cross.* 4 *Do.*, 205, *Brookes vs. Chesley.* Whether the admissions of the defendant, as proved, amounted to an assumption or promise to pay, was a question solely for the court; the *fourth* prayer therefore was erroneous, because it left this question—a question of law—to the jury. See also upon the subject of what admissions will take a case out of the statute: 1 *H. & G.*, 204, *Oliver vs. Gray.* 6 *Gill*, 82, *Guy vs. Tams.* 7 *Do.*, 85, *Ellicott vs. Nichols.* 5 *Md. Rep.*, 376, *Mitchell vs. Sellman.*

2nd. As to the *letter:* Its *general admissibility* is conceded. We say it was also admissible for *both* the purposes for which it was offered, *viz.*, the purpose of rebutting the evidence of Sherwood in relation to the plaintiff's admissions about his indebtedness of $200, and to corroborate that of Ridgaway, whose credibility had been assailed by the defendant. If admissible for *either* of these purposes the court was right in overruling a *general* objection to its admissibility. 7 *Md. Rep.*, 606, *Pegg vs. Warford.*

3rd. As to the *book:* The court below was right in refusing to permit it to be read to the jury. 1st. Because the plaintiff never offered it as evidence to the jury. 2nd. Because if he had desired it the defendant was at liberty to have offered it himself, it having been proved to be in the handwriting of the plaintiff. 3rd. Because this exception does not disclose the fact, that the book contained any accounts between the plaintiff and defendant relating to the subject matter of this contro-

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versy. 1 *Esp.*, 209, *Sayer vs. Kitchen.* 7 *Sergt. & Rawle*, 14, *Withers vs. Gillespy.* 1 *Johns.*, 395, *Kenny vs. Van Horne.*

LE GRAND, C. J., delivered the opinion of this court.

This is an action of *assumpsit*, instituted by appellee, to recover compensation for services alleged to have been rendered to the appellant, and for money laid out and advanced for him at his request. Issue was joined on the pleas of *non assumpsit* and limitations. In compliance with a demand for a bill of particulars, the appellee furnished the one in the record.

The plaintiff, after giving evidence of the services, &c., rendered by him at Poplar Island, proved by William S. Ridgaway, "that in June 1850, the defendant, in company with James Smith and James Treakle, came to Poplar Island, and that during said visit, defendant exhibited to witness various accounts and vouchers referring to plaintiff's and defendant's affairs; that one of said accounts was in a book, that all the charges were together and all the credits were together, forming one general account; that the last item on the debit side of said account was for services, but no amount was extended; that independent of said item for services, there appeared to be a balance in favor of plaintiff of about $70 or $80, which Col. Carroll said was right. One of the credits upon said account was the rent of the farm for 1849; the plaintiff said in relation to the item for services, that as the mill had turned out unprofitably, he thought Robert, the plaintiff, would not charge him anything; that if the mill had turned out profitable, he would have been willing to pay a large salary; that there was a charge in said account for money paid to Socrates Ridgaway for services in attending to the saw-mill, &c., which was at the rate of $300 per year; that defendant said that charge was right, and that he did not think Robert's charge ought to be more than at that rate, and that he, defendant, would not be willing to pay plaintiff more than at the same rate paid Socrates Ridgaway." After the introduction of this testimony, the defendant proved certain accounts, which were offered in evidence, to be in the handwriting of the plaintiff, and also that the wit-

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ness, William S. Ridgaway, had said to persons, who testified to the fact, that the plaintiff, while in charge of the farm at Poplar Island, had managed things badly. In addition to this testimony, the defendant proved by J. T. Sherwood, that in the fall of 1849, in October or November, and a very short time before plaintiff gave up the farm on Poplar Island, he was called upon by plaintiff to act as arbitrator in the settlement of some difference between the plaintiff and his mother; that upon that occasion, the plaintiff stated to witness that he, the plaintiff, was then indebted to defendant to the amount of $200; that the said witness' impression is, that it was on account of rent; that said plaintiff stated, that he has paid the defendant $200, and that there was at that time a balance of $200 due defendant, and that the said witness and the other arbitrator allowed plaintiff to retain a quantity of wheat to pay said balance; the said witness also proved, that said plaintiff did not, to his knowledge, state that the said balance of $200 was due defendant on account of rent for the farm for the year 1846." After this testimony, the plaintiff recalled the witness, W. S. Ridgaway, who proved, "that he was present at the conversation between the plaintiff and Sherwood, and that said plaintiff said that the said sum of $200 was due to defendant on account of rent for 1846, and that the plaintiff had not paid any of the rent for 1846, and that on the said account examined by Col. Carroll, in June 1850, there was a credit for this $200 for rent for 1846."

The plaintiff then offered in evidence a letter from the defendant to the plaintiff, dated the first day of February 1847, "for the purpose of rebutting the evidence of Sherwood as to the admission of the plaintiff touching the indebtedness of $200, and for the purpose of corroborating the testimony of William S. Ridgaway, that said admission of plaintiff proved by Sherwood was in reference to a balance of rent due for the year 1846." To the admissibility of the letter in evidence the defendant objected, but the court overruled the objection. This ruling of the court constitutes the first exception.

The letter contains reference to several matters unimportant to the present inquiry. The only part having any bearing on

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the question now presented is in these words: "I did not want you to pay up the whole rent for the last year, or any arrears, if any, but to keep it to pay for hands cutting wood, shingles, digging well, cutting down timber for the mill, (which should be done in the dark of the moon in February.")

It was competent to the plaintiff to have offered the letter *generally* as evidence in the cause, and to have argued from it before the jury. The distinction between offering evidence *in the cause* and for *a specific* purpose, is recognised in a great number of cases. *Sothoron vs. Weems*, 3 *Gill & Johns.*, 435. *Goodland vs. Benton*, 6 *Gill & Johns.*, 481. *Keller vs. Donnelly*, 5 *Md. Rep.*, 271. Whether or not the letter of the defendant was competent evidence to rebut the testimony of Sherwood, it certainly was admissible to corroborate that of Ridgaway; and in the case of *Pegg, et al., vs. Warford*, 7 *Md. Rep.*, 606, this court held, that where testimony is offered for *several* purposes and it be admissible for any one of them, a general objection will not be sustained, such an offer being regarded as a *general* offer, and as such, is good. In the case last alluded to, this court said: "But it has been said, that as this evidence was received for all or either of the three purposes for which it was offered, unless it was legally applicable to each, the jury might have been misled and applied it to one of the purposes to which it did not relate. To avoid such a result, it was the duty of the counsel objecting to have pointed out specifically the purpose to which the testimony had no legal application, and to ask its exclusion for such purpose." We think the court properly overruled the objection.

The defendant presented five prayers, all of which were rejected. Their rejection constitutes the second and third bill of exceptions. All these prayers relate to the plea of limitations, and were, with the exception of the fourth, in our opinion, properly rejected.

With the exception of the fourth, they are founded on the hypothesis, that even if the jury believed the testimony of the witness, William S. Ridgaway, but also believed the services were rendered more than three years before the institution of this suit, then there was no evidence to take the case out of

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the statute. Some of the prayers apply to the whole claim; some to all of it but the services bestowed on and about the mill; and others to the supposed want of proof of assumption of debt or promise to pay.

The evidence of the witness, Ridgaway, if believed by the jury, was sufficient to relieve the case from the bar of the statute. The defendant—at least so far as the testimony of that witness is concerned—not only did not deny, but conceded, the services had been rendered. He thought, and so expressed himself, that the charge was too great, because the mill had not turned out profitably. In other words, he but expressed the opinion, that the charge was too high under the circumstances, and his unwillingness to pay so large a claim. This is the real substance of his conversation, as testified to by the witness.

The fourth prayer ought to have been granted. It merely declared the claim to be barred by the statute, unless the jury should find from the evidence "an assumption or promise by the defendant, within three years before the bringing of this suit, to pay for said services." By rejecting all the prayers of the defendant, the jury were left without any instructions whatever in regard to the law. The fourth prayer of the defendant was, in substance, identical with one held to be good in *Duvall vs. Peach*, 1 *Gill*, 181.

We think the court erred in refusing to allow the book marked "C" to be read to the jury. It was produced, in compliance with a notice served on the defendant by the plaintiff, and was proved to be in the handwriting of the latter. It professed to contain the account between the parties, and the defendant was surely entitled to its use, precisely as he would have been entitled to that of any other memoranda of plaintiff relating to their dealings.

Judgment reversed and procedendo awarded.

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THOMAS CORNER, BAPTIST W. CORNER, and GEO. W. CORNER, *vs.* EDWARD H. PENDLETON.

In an action to recover money lost at play by the plaintiffs' clerk from the party to whom it was lost, the plaintiffs proposed to produce a collection book kept by the clerk, and to show that he had not entered therein certain sums collected by him as it was his duty to do. HELD, that this evidence was wholly *irrelevant* to the issue in this case.

Where the right to recover depends upon several distinct propositions of fact, and the party fails in *either*, there is, in the language of the law, a *total failure* of evidence, and the court may so instruct the jury.

This total failure of evidence *also* occurs where the evidence is so slight and inconclusive, that no rational well constructed mind can infer from it the fact which it is offered to establish, and the jury would be left to draw deductions from wild speculation and conjecture.

Where the fact to be proved involves moral delinquency, the evidence should be so strong as to exclude the presumption of innocence, for innocence is presumed until guilt is proved.

Slight presumptions, although sufficient to excite suspicion or produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either amount to proof or shift the burthen of proof.

Where a number of such circumstances concur, they should be so strong as to satisfy the jury of the existence of the fact they are offered to establish; they must furnish more than the *probability* of the fact.

APPEAL from the Court of Common Pleas for Baltimore city.

Assumpsit, brought on the 3rd of November 1852, by the appellants against the appellees, to recover money lost at play at defendant's gaming-table by Rogers, their clerk, alleged to belong to the plaintiffs. The count in the *nar* relied on was for *money had and received*. Plea, *non assumpsit*.

1*st Exception*. The plaintiffs proved by Rogers, (to whose competency as a witness all objections were waived by the defendant,) that he played at faro at the defendant's gaming-table and lost there $400 between April and July 1851. They then proved that Drakely and Fenton, during the months of May and June, paid said clerk two checks upon the Western Bank of Baltimore, (which were paid by the bank,) for sums of money which it was his duty to collect for the plaintiffs. They then offered in evidence a collection book kept by said clerk,

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and offered to follow it up by proof that it was his duty as such clerk to enter therein all sums of money collected by him, and that said sums so paid by Drakely and Fenton were not entered in said book; but to the admissibility of the same defendant objected, which objection the court (MARSHALL, J.) sustained, and the plaintiffs excepted.

2nd Exception. The plaintiffs then proved, that in July 1851 said clerk was under arrest, they charging him with having embezzled from them the sum of $2000, and that, induced by a desire to keep the matter a secret from their mother and family, his two brothers gave plaintiffs their four joint promissory notes for the $2000 thus claimed of said clerk, in sums of $500 each, payable at six, twelve, eighteen and twenty-four months from date. They then proved that said clerk was born and raised in the city of Baltimore, never having been out of the city for more than four years during all his life; that he possessed no means whatever, and that he had not one cent. They then offered various receipts showing that said clerk, in his duty as such, had collected various large sums of money from Drakely and Fenton on account of plaintiffs during the months of June and the early part of July 1851. Upon all the evidence the plaintiffs offered the following prayers:

1st. If the jury believe from the evidence that said clerk collected money for the plaintiffs in this case and lost the same, or a part thereof, in gaming, to the defendant, then they are entitled to recover of defendant so much as the jury may find he won of said money.

2nd. If the jury find that the promissory notes given to plaintiffs by the brothers of said clerk, were so given by them with the motive to conceal from their mother and family the fact of the alleged retention by said clerk of the money of the plaintiffs, then such motive constitutes no valid legal consideration of itself to render them responsible upon said notes, and that their mere existence in the hands of the plaintiffs creates no obstacle to the plaintiffs' recovery in this case.

3rd. That there is no evidence in this cause of any valid legal consideration moving from the plaintiffs, or any other person, to the drawers of said notes for the same.

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4th. If the jury find the facts set forth in the first prayer, then the giving of said notes and the acceptance of them by the plaintiffs do not of themselves in law operate as a payment of the sum claimed in this action, nor as satisfaction for the same, nor as an accord and satisfaction for the demand set forth in the declaration, nor as a waiver or extinguishment thereof, nor as purging the tort as arising out of the gaming set forth in the first prayer upon which the implied *assumpsit* in this case is founded.

The court rejected each of these prayers, and to this ruling the plaintiffs excepted.

3rd Exception. The defendant upon all the evidence asked the following instructions:

1st. That the plaintiffs are not entitled to recover, because there is no evidence that defendant was at any time in possession of the plaintiffs' money, for the recovery of which this action is brought.

2nd. That if the jury find from the evidence that plaintiffs took the notes of the brothers of said clerk in satisfaction, if paid at maturity, for the sum or sums claimed or alleged to have been embezzled by said clerk, then the plaintiffs are not entitled to recover.

These prayers the court granted, and to this ruling the plaintiffs excepted, and the verdict and judgment being against them, appealed.

The cause was argued before LE GRAND, C. J., TUCK and MASON, J.

Grafton L. Dulany for the appellants.

1st. It is very clear, that if the money lost by the clerk of the plaintiffs to the defendant was not his, but theirs, they can recover in this action. The proposition may be assumed, that whenever the property of one man comes to the hands of another, unless he be a *bona fide* purchaser for a valuable consideration without notice, the title of the original owner still continues, and he may sustain an action to recover it from the possessor. 3 *How.*, 402, *Oliver, et al., vs. Piatt.* 1 *Maule*

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& Selw., 714, *Randoll vs. Bell.* 15 *Ves.*, 440, *Lupton vs. White.* 14 *Penn. State Rep.*, 295, *McCullough vs. McCullough.* 12 *Clark & Finnelly*, 764, *Murray vs. Pinkett.*

2nd. The notes given to the plaintiffs did not extinguish or satisfy the demand in this case. There is not a single fact in the case which shows that they were given or intended for the benefit of the defendant. The evidence is expressly and positively the other way, the consideration being to pass concealed the entire transaction, from motives of affection to a parent. With the gamester, Pendleton, the drawers of the notes had no dealings, nor even an acquaintance, nor any imaginable inducement to pay him the money which he held of others. The creditor may go against the original debtor, notwithstanding the notes; nothing but *payment* will satisfy the *debt*. 5 *H. & J.*, 425, *Merryman vs. The State.* 6 *Do.*, 256, *McIlhenny vs. Jones.* 1 *H. & J.*, 48, *Pearce vs. Wallace.* 2 *G. & J.*. 344, *Williamson vs. Allen.* 11 *Do.*, 287, *Sangston vs. Maitland, et al.*

3rd. There was evidence to go to the jury, that the money lost by Rogers to defendant belonged to the plaintiffs. I do not believe that it is possible for any impartial mind, attentively considering the circumstances disclosed by the record, to arrive at any other conclusion than that the money lost was the property of the plaintiffs. It was proved that the clerk of the plaintiffs, between the months of March and July 1851, lost $400 to the defendant at his gaming-table. It was proved, that whilst he was in their employment he had taken of their money $2000, which he did not return to them. There is positive proof, that at this time he had no means—not one cent; that is, of his own money. The inference is irresistible, that the money which he lost to Pendleton was part of the money which he had withheld from the Corners. There is no proof that he had money belonging to any one else, or that he borrowed money upon his credit, or had received wages as a clerk, or that he was entrusted with their money by others than the Corners. The question then is, whether the facts in the cause in favor of the plaintiffs, taken by themselves and uncontradicted, constitute evidence sufficient to go to the jury

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as tending to prove the issue on the plaintiffs' side? The solution of this question does not depend upon any legal principles, but upon the nature and character of the facts virtually proved, whether in themselves they directly support the issue on behalf of the plaintiffs, or carry along with them the probable existence of another or other facts not expressly proved which do support the issue. In either case the evidence would not only be admissible, but sufficient; for in all civil cases, according to elementary principles, the verdict is given on that side upon which the weight of *probability* inclines the scales. The jury are not required to find the existence of any facts, but merely their *probable* existence.

The cases cited on the other side, decided by the Court of Appeals, are not any of them analogous in their circumstances, in regard to the question I am now considering, to those of the present case, and establish nothing more than the general principle, which is not denied, that it is for the court to pronounce, in the first instance, upon the "sufficiency of the evidence" to be submitted to the jury; but as furnishing a test whether the evidence in this particular case is sufficient, they vary so much, each of them in their circumstances, from the special facts proved in this cause, that they are quite inapplicable and useless. The case of the *Mechanics Bank vs: Cook*, tried in Baltimore county court, before Chief Justice Le Grand and Judge Purviance, appears to me to be a case directly in point, upon the question mooted here. The facts of the case, as well as I can recollect them, were strictly these:

It was proved that Turner, one of the clerks of the bank, had, in the course of a series of years, embezzled a very large sum of money from his employers, and being charged with his offence, or conscious of the suspicions existing against him, had fled the city; proof was also adduced of peculation on his part some two or three weeks before his flight. Cook, the defendant in the action, was a police officer, who was sent in pursuit of Turner, whom he found, some six weeks or two months after he had left Baltimore, in Canada, having on his person a roll of British guineas, amounting to $284.84.

This sum was taken by Cook, brought to Baltimore and

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placed on special deposit in the Mechanics Bank, Cook being warned by Turner that he claimed the money as his own, and that he should not pay it over to the bank. An action of assumpsit was then brought by the bank against Cook for the recovery of the money he had taken from Turner, on the ground that in fact it was the bank's property. At the trial of the cause, in addition to the facts proved as stated above, testimony was adduced to the effect, that Turner had no means of his own; which was attempted to be rebutted by evidence that he had. There was no *direct* proof that the roll of guineas found on the person of Turner was the property of the bank; they were not identified by positive evidence.

On this state of facts the bank asked the court's direction to the jury, that if they found from the evidence, either that the money taken by Cook from Turner was by him embezzled from the bank or was the proceeds of that which had been so embezzled by him, then the bank was entitled to recover; this direction was granted by the court, and the jury gave a verdict in favor of the plaintiffs for $284.84.

But before the court's decision on the plaintiffs' prayer was given, the defendant's counsel, as well as I recollect, the late Attorney General, Mr. Richardson, objected, that there was no sufficient evidence to go to the jury of the plaintiffs' title to the funds they sought to recover—that the money was not identified as the plaintiffs' property. This objection was earnestly argued on both sides, and the court, overruling the objection, decided that there was *prima facie* evidence sufficient to go to the jury for their consideration in relation to the purpose for which it was offered. The verdict being for the plaintiffs, a motion for a new trial was made and argued before a full court, when the motion was overruled. This case appears to me to be strongly in point.

R. T. Merrick and *Robert J. Brent* for the appellee.

1st. As to the *first exception:* It is difficult to perceive what the duty of Rogers, as clerk of the plaintiffs, had to do with the liability of the defendant in this case. There is no attempt to identify the money collected by Rogers, and not

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entered in the book referred to, with any money the defendant ever had. And even if there was, the book kept by Rogers would not be competent evidence to aid in establishing that identity in this case. It is nothing but his declaration. In an action against him it would be admissible, but in action against a third party he is, himself, a competent witness, and had actually been sworn in this cause.

2nd. The taking of a note for a precedent debt, if taken with *the understanding that it is in full discharge of that debt*, is an extinguishment of that debt, whether the note be paid at maturity or not. And the fact of taking a note for a precedent debt is, *in law*, a suspension of the right of action on the debt until the maturity of the note. 1 *Parsons on Cont.*, 365, 368, 369. 2 *Do.*, 197, 198. 16 *Penn. State Rep.*, 450, *Stone vs. Miller*. 1 *Barn. & Adol.*, 603, *Smith vs. Alger*. 1 *Md. Rep.*, 110, *Mudd vs. Harper*. 2 *G. & J.*, 493, *Glenn vs. Smith*.

3rd. There is no evidence whatever, in the record, that Rogers ever appropriated to himself, or to any purpose, other than proper and legitimate purposes, any money of the plaintiffs that came into his possession. The only attempt made to establish the fact that he had been guilty of the charge they made against him, was in the offer of the book in which they allege it was his duty to have made an entry of certain moneys received by him on their account, and in which book they allege the entries did not appear. From this fact they intended to draw the inference that he had appropriated that money. The court very properly rejected this evidence. It was the declaration of a third party, and if proved by a competent witness, was a fact, from which no rational mind conld draw the conclusion, that a clerk who had thus simply failed in a manual duty of his office, had therefore been guilty of so grave and serious an offence as that sought to be established by it. It was not an attempt to prove a false or fraudulent entry, but simply a failure to make an entry, which was a circumstance perfectly consistent with a more charitable hypothesis than criminal guilt. But if it were in proof that he had embezzled the money of the plaintiffs, where is the proof that this defend-

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ever received it? The only proof relative to this defendant's intercourse with Rogers is, that he won from Rogers some $400. But there was no attempt to identify this money, and privity between the plaintiffs and this defendant was not pretended. The plaintiffs were pursuing a fund, which, in order to recover from this defendant, it was necessary they should identify—should establish by evidence to be the particular money to which they had title. There is no such evidence in the record. The most unfavorable view of this case for the defendant, when presented by the plaintiffs on their behalf, is: Rogers was the plaintiffs' clerk; Rogers had the plaintiffs' money; Rogers lost $400 to defendant; Rogers had no money of his own, and therefore the money Rogers lost was the plaintiffs' money, and they are entitled to recover it in an action for money had and received to their use. This certainly institutes a new mode by which an indebtment is to be established in the State of Maryland. But Rogers had more than $400 of the plaintiffs' money. They allege he appropriated $2000. Where is the rest? Pendleton didn't get all of it: what became of the rest?

The case of *Jones vs. Mechanics Bank*, 8 *Gill*, 123, is one similar to the present, but with much stronger proof against the defendant than in the present case, and yet the Court of Appeals did not hesitate to say that the evidence was not sufficient to support the action. Where the deduction sought to be drawn would be merely from wild speculation and conjecture, or where the evidence is so slight and inconclusive that no rational, well constructed mind could make therefrom the inference sought to be deduced, in all such cases the court may, and will instruct the jury, that there is no evidence, or no sufficient evidence, in point of law, to establish the fact sought to be proved. 7 *G. & J.*, 95, *Farmers Bank vs. Duvall.* 4 *Md. Rep.*, 283, *Thurston vs. Lloyd.* 9 *Gill*, 331, *Clarke vs. Marriott.*

TUCK, J., delivered the opinion of this court.

We are of opinion that the point made by the first exception, as to the admissibleness of the collection book offered by the

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plaintiffs, was properly ruled against them. The failure on the part of their clerk to enter collections in the book was wholly irrelevant to the issue in the cause, which was whether Rogers had lost the plaintiffs' money at play with the defendant. The offer concedes the necessity of proving that he had collected money of the plaintiffs' before the book could be used. Of what avail then the omission to enter the sums collected could be after its receipt by the clerk had been proved, we are at a loss to conjecture. But suppose it had appeared by the book that these sums were entered, would that have affected the plaintiffs' case? Certainly not. He might still have recovered if he had traced the money to the defendant's possession. In either aspect, the effect of producing the book would be the same, and not tending to prove the issue it was well rejected.

The second exception embraces four prayers offered by the plaintiffs, all of which were rejected. The reason assigned here for the refusal of the first of these prayers is, that there was no evidence legally sufficient to warrant the jury in finding, that Rogers lost the plaintiffs' money with the defendant. If this proposition be maintained, the defendant's *first* prayer in the third exception was properly granted.

In many cases it is very difficult to define the line which separates the province of the jury, in deciding facts, from the power of the court to withdraw the case from their consideration altogether, on the assumption, that the evidence, if believed by the jury, is not legally sufficient to prove the issue sought to be established. If the right to recover depends on several distinct propositions of fact and the party fails in either, it is a case of total failure, in the language of the law; and this may occur, not only where there is no evidence whatever as to one or more of the propositions, but where it is so slight and inconclusive that no rational, well constructed mind, can infer from it the fact which it is offered to establish, (*Cole vs. Hebb*, 7 *G. & J.*, 20,) and the jury would be left to draw deductions from wild speculation and conjecture. *Ibid.*, 95, *Farmers Bank vs. Duvall.* Considering that juries are designed for the trial of issues of fact, it would perhaps have been safer if courts had

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contented themselves with interfering only in those cases where there was an absolute want of evidence as to all or any one of the propositions necessary to be proved, leaving to the jurors the right to decide in all cases where any evidence was offered tending to prove the matters in dispute. The court's control over verdicts by the power to grant new trials, would, we think, be a sufficient security against abuse of authority by the jurors. But as we find this to be the established law in this State and elsewhere, substituting in such instances the judgment of the court for that of the jury, it is our duty to apply it in the present case, unless the record shows that the evidence offered leads to the conclusion, as matter of fact, that the money collected by Rogers passed to the possession of Pendleton, at his gaming-table.

That Rogers collected money for the plaintiffs during the time that he was in the habit of visiting the defendant's rooms there can be no doubt, but that this money was lost there is not apparant. If it had been proved that during this period of time Rogers had no other money from any source, the inference would be reasonable, that this money only could have been gambled by him. But the evidence does not go to that extent. It shows that "he possessed no means whatever and that he had not one cent," without defining the time to which this statement of his condition was intended to apply. The inference is not reasonable that the witness was speaking of the whole lifetime of this young man. He was employed in the commercial house of these plaintiffs, discharging, among others, the responsible duty of collecting large sums of money. We cannot presume that he was doing this for nothing, or that he had no credit by which he could obtain money. The case goes upon the ground that the clerk embezzled from his employers, and a verdict for the plaintiffs could have been rendered on no other hypothesis. This it was sought to establish by inferring, that contrary to his duty, the sums collected had not been accounted for, and superadded to this, by another inference, that because he had, during these periods, played at faro with the defendant, therefore he lost this money and none other. The identity of the money lost with the funds

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collected was the fact to be proved. Depending upon circumstantial evidence, and involving moral delinquency, not to say criminal offence, by the clerk, we think the inference should be so strong as to exclude the presumption that he obtained the money elsewhere. "Slight presumptions, although sufficient to excite suspicion or produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either amount to proof, or shift the burden of proof." *Best on Presumptions*, 41. 47 *Law Lib.*, 45. And where a number concur, they should be so strong as to satisfy the jury of the existence of the fact they are offered to establish. 5 *G. & J.*, 304. They must furnish more than a probability of the fact. Moreover, this is a case of conflicting presumptions, where the inference claimed by the plaintiffs, that the money lost by Rogers belonged to them, is met by the principle, that innocence is presumed until guilt is proved. In *Rex vs. Inhabitants of Twyning*, 2 *Barn. & Ald.*, 386, a point of legitimacy arose, depending on the question, whether the mother, whose first husband had left the county twelve months before, was a widow when she married the father of the children, and it was held that the second marriage should be presumed to be valid. The court said, "this is a case of conflicting presumptions, and the question is, which is to prevail? The law presumes the continuance of life for seven years; but it also presumes against the commission of crime, and that even in civil cases, until the contrary be proved. If the female had been indicted for bigamy, the evidence would clearly not be sufficient." *Best on Presumptions*, 59. 47 *Law Lib.*, 54. We suppose that if Rogers had been tried for embezzling these funds, no conviction could have been had on these inferences, when set up against the presumption that he had paid over the money collected, as it was his duty to have done.

Cases of this kind sometimes depend on the authority of decisions on similar facts. And in this view, we think the ruling of the court is sustained by the case of *Jones vs. Mechanics Bank*, 8 *Gill*, 123, where the circumstances were very strong to show that Perry had improperly obtained the plaintiff's money and deposited that very money in the bank. But the

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court held that there was a failure of evidence on this point. In some respects the inference was sustained by facts, about which there could be no dispute, stronger than those presented by the record before us, but the identity of the bank notes drawn by Jones with those deposited by Perry, was not made out by testimony legally sufficient for that purpose.

The case of *Mechanics Bank vs. Cook*, referred to in the argument of the appellants' counsel, if in conflict with *Jones vs. The Mechanics Bank*, 8 *Gill*, 123, must yield to its authority, as the judgment of the court of last resort.

As this view of the case shows the plaintiffs had no standing in court, the other prayers, based upon the matters offered in defence, need not be considered and passed upon by us.

Judgment affirmed.

JOHN S. PEACOCK, Assignee of the STATE OF MARYLAND, *vs.* GEO. W. PEMBROKE, Garn. of JOHN B. RUSSELL and JOHN A. CLARKE.

Where a judgment in favor of the State is paid by a surety, there is no statute which authorises an assignment thereof to be made by the State, or by any officer or agent acting for the State, to such surety, and it cannot be done, under the act of 1763, ch. 23, sec. 8, by the *attorney* for the State.

Under the acts of Assembly of this State payment to the attorney of the State is no satisfaction of the judgment in favor of the State, and his release or receipt is no discharge of it.

APPEAL from the Circuit Court for Saint Mary's county.

This was an *attachment*, issued at the instance of Peacock, as *assignee of the State*, on the 29th of October 1850, against Russell and Clarke, and laid in the hands of Pembroke, as garnishee, who appeared and moved to quash the writ, for the reasons stated in the opinion of this court.

The writ recites, that at March term 1848 of Saint Mary's county court, the State recovered judgment against Russell,

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Peacock and Clarke, which judgment the said Peacock hath since paid and satisfied to the State, "and the said State hath made over and transferred unto the said John S. Peacock the judgment aforesaid, according to the directions of the act of Assembly in such case made and provided, as by the record thereof in the court fully and clearly appears, in virtue of which assignment and the act of Assembly aforesaid, the said Peacock, as assignee of the State, is entitled to have his execution against the said Russell and Clark; therefore," &c.

The court, (CRAIN, J.,) quashed the writ, and Peacock appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, J.

B. T. B. Worthington for the appellant, argued, that the State was competent to assign the judgment on which the attachment issued, and that the assignment had been regularly and properly made. The act of 1763, ch. 23, sec. 8, provides for the circumstances under which the attachment would issue, and they are the very ones which exist in this case. I refer also to 4 *H. & J.*, 307, *Sotheren vs. Reed;* 5 *Do.*, 423, *Merryman vs. The State;* 7 *Md. Rep.*, 102, *Griffith vs. Etna Fire Ins. Co., Garn. of Upton*, and *Ev. Harris*, 396.

No counsel appeared for the appellee.

ECCLESTON, J., delivered the opinion of this court.

Under a motion to quash this attachment four reasons have been assigned:

1st. That the attachment could not properly issue in the name of Peacock, who was a party defendant in the judgment.

2nd. That the attachment issued after the judgment on which it was issued was dead.

3rd. That the assignment could not be made by the State of Maryland.

4th. That if the assignment could be made by the State of Maryland, it was not properly made.

In our opinion the third reason furnishes a sufficient ground

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for affirming the judgment, and therefore the others need not be considered.

The appellant's counsel insists that the attachment was properly issued under the act of 1763, ch. 23, sec. 8, which authorised the State, as plaintiff, in the original judgment, to assign the same to the appellant, because as surety he had paid the claim. But neither that statute or any subsequent law provides what officer or person shall make an assignment to a surety where the State is plaintiff. When the State is to issue a patent, to make an obligation, or to transfer any of its rights, some officer or agent is vested with authority to act for the State, except where the obligation or transfer is made by direct legislation on the subject.

Perhaps it may be supposed the plaintiff's attorney has authority to make an assignment under the act of 1763. The correctness of such a supposition was questioned in *Norwood vs. Norwood*, 2 *H. & J.*, 238. There the executrix of D. Dulany had obtained judgments against Samuel Norwood and Edward Norwood, upon a bond given by them to D. Dulany, and Mr. Cook, as attorney for the plaintiff, assigned to Samuel the judgment against Edward; and thereupon Samuel, in his own name, as assignee of the executrix of D. Dulany, issued a *fieri facias*, against which an injunction was obtained by Edward. At a subsequent term a motion to dissolve the injunction was overruled. Afterwards the chancellor was very much perplexed with the difficulty of ascertaining, from the evidence, whether Samuel was a mere surety, which was considered as "the main, if not the only question in dispute." The auditor was then directed to state an account between the parties, charging Edward with but one-half of the bond to Dulany, and giving him credits for payments made by him. After a report by the auditor it is said: "Upon the whole, the chancellor conceives it best to consider the complainant as the sole principal in the bond to Dulany." Whereupon another account was ordered to be stated by the auditor, differing substantially from the former. And it was afterwards decreed that the injunction should be dissolved, but that only the costs at law, and a particular sum named, with interest, should be

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levied under the execution. But because Edward had a decree against Samuel, for a sum larger than the amount which Samuel was held to be entitled to under the execution, it was finally adjudged, that the injunction should be continued until the further order of the chancellor. From this decision an appeal was taken by Samuel.

In the Court of Appeals it was contended by the appellee's counsel that the appellant must prove he was a surety, and as such had a regular and legal assignment. That the execution issued in the name of the appellant, as assignee of the plaintiff, was not justified by the act of 1763, under an assignment made by the attorney, but it should have been made by the principal creditor or plaintiff in the judgment.

The court reversed the chancellor's decree and dissolved the injunction, but held that Samuel was co-principal and joint debtor in the bond with Edward; therefore, they only charged him with one-half of the bond. And they decreed that the appellant should be permitted to take out execution against the appellee on the judgment, but that it must be sued out in the name of Rebecca Dulany, as executrix of Daniel, for the use of the appellant. This decision, therefore, in the Court of Appeals, simply recognised the assignment by the attorney as an *equitable* assignment of one-half of the judgment to a co-principal in the bond, on which the judgments were obtained. The act of 1763 makes no provision for such a case, but, in reference to the assignment of judgments, relates only to judgments which have been satisfied by sureties. And considering the appellant not to be a surety but a co-principal, there was no necessity for the court to decide whether the attorney could make a legal assignment under the act to a surety.

In ordinary cases, where the State is not the real plaintiff, the attorney has control and authority over the suit, in many respects, and amongst others he has a right to receive the money due to his client, but he has no right to receive money due to the State upon judgment in such a case as that recited in the attachment.

The act of 1831, ch. 68, sec. 3, provides: "That hereafter

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no payment of any money or debt due the State, either in suit or on judgment, shall be valid and effectual, unless made to the treasurer, or to such person as shall have been specially appointed and authorised by him to receive the same, or unless made to such sheriff, coroner or elisor, as may or shall be authorised to receive the same by virtue of any execution or other judicial process issued on such judgment to enforce the recovery or payment thereof, any law, usage or custom to the contrary, notwithstanding." See also the act of 1829, ch. 90, sec. 4.

Should it be conceded that the plaintiff's attorney, by virtue of his general authority as such, may, under the act of 1763, make a valid legal assignment of the judgment in ordinary cases, yet we think the attorney of the State cannot do so in a case like the one under consideration, because of his restricted or limited authority. Payment to him is no satisfaction of the claim, and of course his release or receipt would be no discharge of it. We therefore cannot suppose he has authority to assign the judgment in the mode contemplated by the act of 1763. And finding no legislative enactment giving power to any officer or agent to make such an assignment, where the State is the real plaintiff, we must decide in favor of the appellee, upon the ground taken in the third reason assigned for quashing the attachment.

This decision is confined to the subject of a *legal* assignment under the act of 1763, and has no reference to the *equitable* rights of sureties who have paid off judgments.

Judgment affirmed.

JNO. HENDERSON *vs.* THE MAYOR & CITY COUNCIL OF BALTIMORE, use of JOHN ESCHBACH.

The ordinances of the city of Baltimore in relation to paving of streets, confer on *property owners*, not only the right to have their own lots improved

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by paving in front of them, but also the power to *compel* others to submit to and pay for such supposed improvements.

The paving tax is due immediately after the commissioners make out the lists of persons assessed, and its payment may be enforced before any portion of the paving is commenced.

The assent in writing of the proprietors of a majority of feet fronting on the street to be paved must appear to have been given before the paving is ordered, and the want of such assent may be shown as a defence to an action to enforce collection of the tax.

Where a deed is executed and acknowledged by parties living in different counties and on different days, the presumption arising from its date, that it was delivered on that day, cannot stand against the positive averments in the acknowledgments, that it was executed afterwards.

Questions arising upon the face of a deed, unconnected with parol proof, are for the decision of the court.

A prayer that there is no evidence of the assent of certain parties, "and they *not having so assented* the plaintiff is not entitled to recover," is not objectionable in form; the latter clause is but a *statement* of a reason for the conclusion of law and not the *assumption* of a fact.

The certificate of the commissioners, stating that a requisite number of proprietors had assented to the paving, is not *conclusive* on the question of assent; it has but a *prima facie* effect as the warrant or authority to have the paving done, and those who act under it do so at their peril.

The authority of the commissioners as to paving of streets is special and limited, both as to its scope and effect, and when made the foundation of an action it must appear to have been exercised according to law.

APPEAL from the Superior Court of Baltimore city.

Assumpsit by the appellees against the appellant, to recover the amount of a *paving tax* assessed upon the defendant as his proportion for paving that part of Biddle street between Pennsylvania avenue and George street. Plea, *non assumpsit*.

Exception. The proof on the part of the plaintiff shows that on the 4th of May 1848, application was made to the city commissioners for paving the street in question, agreeably to the acts of Assembly and the ordinances of the city authorities, purporting to be signed by a majority of the proprietors of the feet of ground fronting on said street, and accompanied by a *private contract* made by the same parties with Eschbach for doing said paving. Among the signers to this application and contract was J. T. Shipley, representing himself as the owner of 191 feet, fronting on the street aforesaid, and these feet

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were necessary to constitute the required majority. In the course of the trial due publication of the notice of this application, as required by the ordinances of the city authorities, was proved. On the 15th of May 1848, the board of commissioners passed the following order upon said application, which order was, on the same day, *approved by the Mayor:*

"The city commissioners having given the notice required by law, and having ascertained that the owners of a majority of the feet of ground binding and fronting on Biddle street, between Pennsylvania avenue and George street, have signed the within application to pave said part of Biddle street, and having received the accompanying contract for that purpose, the city commissioners have determined that said part of Biddle street may be paved by private contract."

On the 6th of July 1848, the commissioners delivered their warrant, approved by the Mayor, to the collector, accompanied by a list of the persons liable to pay the paving tax for the same, and directing him to collect the same agreeably to the ordinance approved the 22nd of May 1838. The sum assessed to the defendant, as proprietor of a lot fronting 180 feet on this street, was $358.65. The several ordinances relating to paving in the city of Baltimore, and the ordinance relative to the paving of Biddle street, were also offered in evidence. The plaintiff also offered in evidence a deed from Ann Shipley and her children, as devisees of Johnsee Sellman, conveying to Eschbach a lot fronting sixteen feet on Biddle street. This deed is dated the 19th of April 1848. Some of the grantors resided in Baltimore city, some in Anne Arundel and Worcester counties, and some in the State of Delaware. It was acknowledged by those residing in Baltimore city on the 13th of May, by those in Anne Arundel county on the 19th of April, by those in Worcester county on the 17th of June 1848, and by those in Delaware on the 29th of May 1850, and was recorded on the first of June 1850.

The defendant then proved, that he attended at the office of the commissioners and objected to the contract being entered into, because the requisite number of feet had not been subscribed for, and then proved by J. T. Shipley, that on the

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3rd of April 1848, he made an agreement with Eschbach, (which was signed by Shipley and Eschbach and offered in evidence,) that in consideration that the latter would pave before the property of the devisees of Johnsee Sellman, that they, the devisees, would convey to him a lot fronting sixteen feet on Biddle street. The agreement also declared, that in case the devisees, or any one of them, shall refuse to sanction this agreement, then it was to be null and void, and that Eschbach was not to commence paving until such consent should have been obtained, either by power of attorney to him in their names, or by signing a deed conveying the lot of ground therein mentioned to Eschbach. He also proved by the same witness, that this was the original contract between himself and Eschbach with regard to the paving of Biddle street; that he told Eschbach he did not feel authorised to sign the petition to pave for the heirs, but agreed to sign it upon the condition mentioned in the above agreement, and that Eschbach consented. The defendant then asked six instructions to the jury, only one of which, the second, need be stated:

2nd. That there is no evidence in this case to establish the fact that the proprietors of a majority of the ground binding and fronting on that part of Biddle street upon which the paving was done, as stated in the evidence, assented in writing to the application to pave said street, and they not having so assented the plaintiff is not entitled to recover.

To the refusal of the court (FRICK, J.) to grant this, as well as his other instructions, the defendant excepted, and the verdict and judgment being against him, appealed.

The cause was argued before LE GRAND, C. J., TUCK and MASON, J.

Benjamin C. Presstman and *Grafton L. Dulany* for the appellant, argued:

That under the provisions of the act of 1817, ch. 148, sec. 18, the Mayor and City Council of Baltimore are not authorised to cause any unpaved street, lane or alley, or part thereof respectively, within the city of Baltimore, to be paved without the *previous* assent, in writing, of the proprietors of the *majority* of the

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ground binding and fronting on such street, lane or alley, or the part thereof, to be paved; and that there was no evidence of any such *previous* assent, either at the time when the order of the commissioners to pave was passed or at the time that the contract was entered into with Eschbach. The conditional agreement entered into by Shipley, upon its face, requires the fulfilment of certain conditions before the paving should commence, and these conditions not being fulfilled prior to the making of said contract, no *subsequent* assent will validate the action of the commissioners in ordering the paving to be done. The learned counsel then cited and commented upon the acts of 1797, ch. 54, 1817, ch. 148, sec. 18, and 1833, ch. 40, and the ordinances of the corporation of Baltimore, No. 47, approved May 22nd, 1838, and the supplement thereto, approved March 10th, 1842, ordinance No. 15, approved March 3rd, 1848, and ordinance No. 41, approved April 1st, 1848; and argued, that the ordinance of 1842, permitting the paving to be done by private contract and making the proprietors liable for the paving done under such contract, is *null and void;* it is directly in conflict with the maxim, *potestas delegata non delegari potest*, and is an absurd stretch of power, as it makes all the owners fronting on this street liable to a private contract which the city authorities never made and have no power or control over. But it is said, the order of the city commissioners directing the paving to be done, is to be regarded as a conclusive determination of the question, that a majority of proprietors did sign the application—that this is to be regarded as a *judgment* which cannot be inquired into. This, however, we submit, cannot be the construction of these proceedings. The *previous* assent of a *majority* is necessary, and is a condition *precedent* to the proper exercise of the authority vested in the commissioners to direct the paving to be done, and this may be inquired into in any case in which an attempt is made to enforce collection of the paving tax assessed under such proceedings. We therefore say, upon the principles above stated, that the court erred in refusing to grant either the first, second, fourth and fifth prayers, or all of them.

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James Malcolm and *J. Mason Campbell* for the appellee, after stating the provisions of the acts of Assembly and ordinances referred to by the appellant, argued, that the assent of a majority of the proprietors of ground fronting on the street to be paved, was necessary, according to the provision of the third section of the act of 1817, ch. 148, but that the tribunal designated *by law* to ascertain that fact are the city commissioners. No other body can find the fact, in the first instance, for the purpose of determining whether to pave or not to pave. They have found the assent, and state in so many words, "having ascertained that the *owners of a majority of the feet of* ground binding and fronting on Biddle street, between Pennsylvania avenue and George street, *have signed* the within *application* to pave said part of Biddle street." This is, therefore, a judicial determination of this fact by the judgment of a court of competent authority which cannot be questioned, and must, therefore, be taken as conclusive in this case. The second prayer, which asserts there was *no evidence* of an assent in writing, was correctly rejected, because this judgment of the commissioners was not only evidence, but *conclusive* evidence of this fact. The proposition in the prayer is very different from one which, conceding a *prima facie* assent, overthrows it by superior proof. The assertion is of "no evidence" of utter absence of proof, *prima facie* or otherwise, to show a written assent. Now the fact is directly the reverse, as we have shown. 2 *G. & J.*, 114, *Shillcnecht vs. Eastburn.* 4 *Philips on Ev.*, 209, and cases there cited. But again, the latter clause of this prayer does not put it to the jury to find the fact of assent but *assumes* it, and for this reason was properly rejected.

TUCK, J., delivered the opinion of this court.

We do not think that the ordinances of the city of Baltimore, applicable to the present case, should receive the construction placed upon them by the counsel for the appellee to the full extent of their argument. They virtually confer on property owners, not only the right of having their own lots improved by paving in front of them, but also the power to compel others to submit to such supposed improvements, and

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to pay for the same against their will; and the tax being due immediately on the commissioners making out the lists, payment may be enforced even before any portion of the work is commenced, though laid, not by the municipal authorities in the ordinary exercise of their taxing powers, but at the instance of persons who may be influenced solely by a regard for their own interests. It is true that this is done subject to the approval of the commissioners and the mayor, acting under the provisions of the ordinances, but the machinery necessary to give them effect can be put in motion only by those so interested. This is certainly a very high power to be possessed by any portion of citizens over others. It may be presumed that proprietors, looking to their own interests, will not object if they can perceive that their property will be appreciated by the improvement. But it is not difficult to perceive, that combinations may be formed for the advantage of some to the prejudice of others; and on the other hand, that a single individual, owning a majority of the feet of ground, may subject his neighbors to the operation of the ordinances when illy able to incur the expense, without, in either case, promoting the public convenience to any great extent. To prevent the abuse of the power, certain preliminaries are prescribed which must appear to have been at least substantially complied with, and among these, as most important, is the assent of the proprietors of the requisite number of feet binding and fronting on the street to be paved.

The defendant's *second* prayer asserts, that the evidence on this point was not legally sufficient, and as this proposition, if correct, will dispose of the case, we shall address ourselves to its consideration. There is no testimony to show that Shipley had authority to assent for the owners of the lot whom he claimed to represent. He states in his evidence, that he told Eschbach that he did not feel authorised to sign for the heirs, but did sign upon the conditions mentioned in the agreement of the 3rd of April 1848. The deed, bearing date April 19th, executed as a compliance with the condition on which Shipley signed the application, and relied on by the appellees as evidence of ratification, cannot be considered as operative from its

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date, even if it be otherwise sufficient to remove the objection. Deeds take effect from delivery. It is manifest that this was executed and acknowledged by some of the grantors after the 4th of May, and could not have been delivered on the day of its date. There was no proof as to the delivery other than what appeared on the instrument. Being a point arising upon its face, unconnected with parol proof, it was for the decision of the court. *Barry vs. Hoffman*, 6 *Md. Rep.*, 78. Where deeds, as in this case, are executed and acknowledged in different counties, and necessarily on different days, the presumption arising from the date that the instrument was delivered on that day cannot stand against the positive averment in the acknowledgment that it was executed afterwards. Though this deed may have been executed and delivered before the work was actually commenced, of which, however, there is no evidence, it was but a performance of the condition in the agreement of the 3rd of April, and not a compliance with the prerequisites of the ordinance.

But the frame of this prayer is objected to, on the ground that the latter clause assumes the want of assent without submitting the question to the jury, and that the instruction was, therefore, well refused. We do not think so. The theory of the prayer is, that there was no legally sufficient evidence on this point. The record shows there was no proof of assent by Shipley's heirs, and without the number of front feet owned by them there was not a majority of feet. It is then a case of total failure of evidence, in the legal sense of that expression. There was nothing to be left to the jury. The purpose of the prayer was to take the case from them, on the concession that all the plaintiff's evidence offered on this point was true and that the jury would so find, yet asserting that the facts conceded did not entitle the plaintiff to a verdict. If the words objected to, to wit, "and they not having assented," had been omitted, or if, instead of these, the words "therefore," or "because they have not so assented," had been used, we suppose the prayer would have been unobjectionable in form. The language employed we consider as a mere statement of a reason for the conclusion of law, that the plaintiffs were not entitled to recover, as in the above examples.

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Nor do we agree with the counsel for the appellees, that the certificate of the commissioners is conclusive on the question of assent. At best it has a *prima facie* effect only, as the warrant or authority to have the paving done. But the parties who act under it do so at their peril. If it were otherwise, these commissioners might deem it necessary, in the faithful discharge of their duty, to examine the records to satisfy themselves that the persons assenting as proprietors were really owners of the lots, and in this pursuit, they would doubtless find titles on which they would be wholly incompetent to decide. But if they did decide, the owners objecting would be bound by their judgment. We believe that no such power was designed to be conferred on them. Their authority is special, and limited both as to its scope and effect. It was granted for the purpose of giving sanction to acts *in pais*, affecting the property and rights of others; but when made the foundation of an action, as here, it must appear to have been exercised according to law.

Eschbach cannot justly complain of this result. Without waiting for the consent of the owners in legal form, he treated with a person who he knew had no authority to act for them, and as the liability of the owners not assenting depends upon the regularity of the proceedings under the ordinances, he must take the consequences of his haste. There being a radical defect in the preliminary proceedings, the judgment must be reversed *without procedendo*.

Judgment reversed and procedendo refused.

John H. Basford, Adm'r of Isabella Hutchins, *vs.* John Parran.

In a suit upon two notes given to the plaintiff under a contract, that he could forbear a sale under an execution against a third party, the defendant, (the administrator of the maker,) having offered evidence to show a failure of consideration for the contract, or an abandonment of its provisions by the

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plaintiff, the latter proposed to offer another agreement subsequently made between him and the *daughter* of the intestate, (the maker of the notes,) in reference to the same subject matter, and referring to and making disposition of these notes. HELD, that this latter agreement is *res inter alios* and inadmissible.

APPEAL from the Circuit Court for Calvert county.

Assumpsit by the appellee against the appellant, upon two promissory notes, executed by Isabella Hutchins, the defendant's intestate, in favor of the plaintiff, one for $750, dated September 12th, 1848, payable in six months, and the other for $463, dated the 11th of December 1848, payable at ninety days. The case was tried upon issue joined on the plea of *non assumpsit*.

Exception. The plaintiff proved the execution and delivery of the notes sued on, and there rested his case. The defendant then proved that the plaintiff, Parran, as trustee for the sale of the real estate of James J. Spencer, sold to Michael Lyons a farm in Calvert county, containing three hundred acres of land, and, at May term 1847 of Calvert county court, recovered judgment against said Lyons and his sureties for $1351, upon one of the bonds given for a part of the purchase money. On this judgment a *fi. fa.* was issued, returnable to May term 1848, which was levied on the land so sold to Lyons and returned "not sold by order of plaintiff." On the 15th of July 1848, a *vendi.* was issued, returnable to the second Monday of October 1848. Whilst this writ was in the hands of Dixon, the sheriff, for execution, and whilst the land was advertised for sale thereunder, it was proved by said Dixon that he, acting as the mutual friend and agent of the plaintiff, and Isabella Hutchins, the mother of Lyon's wife, made an agreement between them, by which Mrs. Hutchins was to pass her two notes for $750 each to Parran, which, when paid, were to be credited on the judgment; that on the 12th of September 1848, before the notes were executed, he took a letter from Parran to Mrs. Hutchins, in which the former states, that if Mrs. Hutchins would pay $1000 in cash, he would agree to give one and two years delay on the balance of the judgment, or if she could not make this arrangement,

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then to sign the accompanying notes and he would try to get them discounted; that for the purpose of obtaining a suspension of the sale under the execution Mrs. Hutchins signed the two notes for $750, in accordance with said agreement, and delivered them to the witness, Dixon, to be delivered to Parran; that these notes were drawn by Parran and sent by him to Mrs. Hutchins through the hands of witness, and that the note for $750, now in suit, is one of them, and the note for $463 is a renewal of the other after a part had been paid by Mrs. Hutchins; that these notes were to be credited when paid on the judgment, and were given for the exclusive purpose and consideration of postponing the sale; that Mrs. Hutchin's object in making this arrangement was to secure the land to her daughter, Mrs. Lyons, when the balance of the judgment was paid; that when witness delivered these notes to Parran he took from him a receipt, stating that the notes when paid were to be applied in part payment of the judgment and execution in the hands of the sheriff against Lyons and others, which receipt he never delivered to Mrs. Hutchins in her lifetime, but gave it to defendant, as her administrator, since her death.

At the October term 1848, the sheriff returned the *vendi.* "not sold for want of bidders." Mrs. Hutchins died early in March, and Basford was appointed her administrator in May 1849. On the 15th of September 1849, Parran sued out an *alias* writ of *vendi.*, which, at October term 1849, was returned, "not sold by order of the plaintiff." On the 22nd of November 1849, he sued out a *pluries* writ of *vendi.*, returnable to the following May term, under which the land was sold to Parran on the 10th of April 1850, "for debt, interest and costs," and a deed executed to him therefor by the sheriff. The present suit was brought by Parran on the 22nd of April 1850. The partial payment on the note of $750, reducing it to $463, was applied in part payment of the judgment referred to. The defendant also proved that the land was worth between $3000 and $4000.

The plaintiff then proved that Mrs. Hutchins, after the two notes were given, stated that she had given them to Parran to

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obtain indulgence on the execution, and was trying to raise funds to pay them, and that when Lyons should make the last payment on the land Parran was to convey the same to Mrs. Lyons, her daughter. Lyons died without issue, leaving his widow surviving him. The plaintiff then offered to read in evidence articles of agreement made between him and Mrs. Lyons, the widow, on the 9th of December 1850, by which he agreed to sell the land to Mrs. Lyons for $4017, payable on the 9th of December 1846, with interest, payable annually, and in case of failure so to pay she was to deliver possession of the land to Parran. It was further agreed that Parran should apply, in part payment of this sum of $4017, whatever amount he should recover from the administrator of Mrs. Hutchins upon the two notes now in suit, deducting costs and expenses incurred in the collection. The defendant having first proved the death of Mrs. Hutchins early in March 1849, objected to the admissibility of the above agreement, but the court, (BREWER, J.,) overruled the objection and permitted it to be read to the jury. To this ruling the defendant excepted, and the verdict and judgment being against him, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, J.

John M. S. Causin and *A. Randall* for the appellant, argued:

1st. That the court erred in allowing the agreement between Parran and Mrs. Lyons to be offered in evidence, because it was *res inter alios*, immaterial and irrelevant to the issue, and calculated to mislead the jury. Mrs. Hutchins was neither *party* nor *privy* to this contract, and it was clearly inadmissible. 1 *Starkie on Ev.*, 51. 4 *Pick.*, 108, *Jacobs vs. Putnam.* 7 *G. & J.*, 20, *Cole vs. Hebb.*

2nd. That if this court should reverse the judgment they will not grant a *procedendo*, because it does appear from the proof that the notes, the cause of action in the case, were given by Mrs. Hutchins, to have their proceeds, when collected, applied to the payment of the judgment recovered by

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Parran against Lyons and others, the whole of which judgment was afterwards paid to Parran by the purchase of this property at sheriff's sale for the debt, interest and costs. 3 *G. & J.*, 440, *Sothoron vs. Weems.* 4 *Do.*, 401, *Morgan vs. Morgan.*

Frank H. Stockett for the appellee, argued:

1st. That the indulgence and extension of time on the execution, as shown by the testimony of Dixon, was a sufficient consideration for the notes in suit. *Chitty on Cont.*, 35, 37, 38. *Story on Cont., sec.* 361. 1 *Barn. & Adol.*, 603, *Smith vs. Algar.* Even the proposed benefit to Mrs. Lyons is also a sufficient consideration. *Chitty on Cont.*, 31.

2nd. The consideration has not failed because of the purchase by Parran of the land, on April 12th, 1850, the same not being in violation of any agreement with Mrs. Hutchins. It will be readily seen, on calculating the amount due on the judgment, that on the 12th of September 1848, when the agreement was consummated, the amount of Mrs. Hutchins' two notes did not equal the amount due on the judgment by about $226.98. Mrs. Hutchins had not given her notes, nor had Parran any other security for this amount than such as his judgment might give him. There was no other remedy left him than to sell the land for the payment of this balance. But was this sale in violation of any agreement made by Parran with Mrs. Hutchins, as set forth in the record? In the record appears a copy of a letter sent by Parran to Mrs. Hutchins, wherein he promises to wait with her for the balance due on the judgment for *one* and *two* years, *provided she would pay Mr. Parran* $1000. This letter is dated September 12th, 1846, and as suit was not brought on the notes until the 22nd of April 1850, this letter shows no limitation as to the *time of forbearance*, which has not been complied with. But the postscript to this letter shows, that the agreement between Parran and Mrs. Hutchins, relative to her notes, was not the same, *in effect*, as the agreement relative to the $1000. In this postscript nothing is said relative to any fixed period of extension or postponement. I contend, therefore, that there is nothing in the sale to Parran inconsistent with his agreement

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made with Mrs. Hutchins. She only asked for a "*suspension of the sale*" and an "*indulgence on the execution*," and the record shows that Parran waited with Lyons, or rather granted indulgence on the execution, from September 12th, 1848, to April 12th, 1850. I can see no reason why Parran could not, with justice and *good conscience*, have held on to Mrs. Hutchins' notes and the land also. But willing that Mrs. Lyons, the daughter of Mrs. Hutchins, should have an opportunity of fulfilling the engagement which her mother had entered into, Parran agrees to sell to Mrs. Lyons the farm for the amount of the purchase money due thereon, viz., $4017, (the same being the amount of the judgment—interest added—*vs.* Lyons and others, under which the land was sold, and the amount of another judgment for a like sum, mentioned in the record, to which was also added necessary costs,) and to credit the same with whatever sum he might realize from the two notes of Mrs. Hutchins.

3rd. These articles, we contend, were properly admissible to show that Parran had still a desire to carry out Mrs. Hutchins' wishes, that the *land should be bought as a home for her daughter*, and that Parran *was willing to apply the two notes for that purpose, and thus materially tending to prove the issue*, and therefore admissible. 6 *G. & J.*, 488, *Goodhand vs. Benton.* 2 *Do.*, 404, *Davis vs. Barney.* 2 *H. & G.*, 189, *Ferguson vs. Tucker.*

Mason, J., delivered the opinion of this court.

The true and only question legitimately belonging to this case, is the construction or effect of the agreement between Mrs. Hutchins and Mr. Parran, the appellee, which related to the forbearance to sell, on the part of the latter, under his execution against Lyons. But this question in fact is not raised, but only foreshadowed, by the present record.

By virtue of the agreement referred to, Mrs. Hutchins executed her two notes, for $750 each, to the said Parran, which were not paid upon maturity. Subsequently another contract was entered into, which is set out in the record, between Mrs. Lyons (her husband, Michael Lyons, and her mother, Mrs.

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Hutchins, being dead,) and the said Parran, relating to the same subject matter, and referring to and making disposition of the notes executed by Mrs. Hutchins under the previous agreement. The present suit is instituted against Mrs. Hutchins' administrator, the appellant, to recover the amount due on those notes. Evidence was submitted on the part of the defendant to show the circumstances or consideration upon which the notes were executed, and that the consideration had either entirely failed, or that the plaintiff had abandoned or forfeited the contract by renewing his process against Lyons. Thereupon the plaintiff offered the agreement with Mrs. Lyons as rebutting evidence. To the admissibility of this agreement, as legal evidence, the defendant objected, and this is the *single question* before us on this appeal.

The purpose of the defendant's testimony was to show, as we have said, a failure of consideration for the contract, in pursuance of which the notes were given; or, an abandonment of its provisions by the appellee, in resorting again to his original process against Lyons. No objection was made to the admission of this testimony, and whether it was legal and sufficient to establish that for which it was offered, is not for us now to say. But if it was sufficient to show that Mrs. Hutchins, or her estate, had been discharged from liability for the notes, surely no subsequent acts or dealings between Parran and Mrs. Lyons, or any other person, without the privity or consent of Mrs. Hutchins' representative, could have the effect of reviving her liability upon those notes, and it matters not what arrangement or disposition, however apparently equitable, was proposed to be made of them under the new agreement. This whole contract, as it relates to the first agreement, was *res inter alios*, and therefore not admissible as evidence against a party not privy to it. While the agreement between Mrs. Lyons and Parran might be binding upon themselves, it could nevertheless have no effect in binding others not parties to it.

The view thus expressed settles the only question involved upon this record, and thus disposes of the whole case as we find it. We do not feel at liberty upon this appeal to pass upon the original contract, as no such point is raised. That

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contract, and the subsequent conduct of the parties in regard to it, as may be illustrated upon a new trial, must all depend upon their own peculiar merits. The suggestion that we should withhold a *procedendo* is therefore not adopted.

Judgment reversed and procedendo awarded.

Henry P. Brooks, Permanent Trustee of Henry P. Thomas, *vs.* Henry P. Thomas and John H. T. Jerome.

To overthrow the positive denials in an answer to the allegations of the bill they must be disproved by the testimony of *two* witnesses, or by *one* witness accompanied *with* pregnant circumstances.

A knowledge that a party is negotiating or compromising with his creditors, accompanied with the actual information that he *was generally considered insolvent in his neighborhood*, is, in contemplation of the act of 1834, ch. 293, *notice* of insolvency.

Though a proposition from a debtor for a composition with his creditors is not *conclusive* evidence of insolvency, yet it is one of the most *pregnant circumstances* from which to infer insolvency.

To avoid a transfer, under the act of 1834, ch. 293, the debtor must, at the time, have "no reasonable expectation of being exempted from liability or execution for or on account of his debts without applying for the benefit of the insolvent laws," and the preferred creditor must have *notice* of such condition of insolvency.

Appeal from the Court of Chancery.

The bill in this case was filed on the 15th of October 1850, by Brooks, as permanent trustee of Thomas, an insolvent debtor, to set aside certain alleged preferences made by the insolvent to Jerome.

The proceedings show that Thomas and one Childress commenced business as grocers in the city of Baltimore, in September 1847, and carried it on till March 1848, when they dissolved, and Childress retired, taking with him the capital which he put in, about $600, and his share of a small esti-

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mated profit. No cash capital was furnished by Thomas, but he brought into the concern about $600 worth of groceries which he had purchased from Jerome, (in whose employment he had previously been,) upon credit, who charged them to the firm. After the dissolution in March 1848, Thomas continued to carry on the business by himself until some time in September or early in October following, when he failed, and proposed to make an assignment of all his assets for the benefit of his creditors, provided they would release him. Jerome, to whom he was then indebted to the amount of $2130, agreed to do this, but some of the other creditors refusing, the assignment was not made. On the 12th of October, Thomas sold his entire stock of goods to one Evans for $604.38. The negotiation for this sale was communicated to Jerome by Evans, and before it was finally completed Evans required, and Jerome gave him, a guaranty that the sale should not be disturbed. The whole, or the greater part of, the proceeds of sale he paid over to Jerome, which, with some other money, amounted to $900 in cash, and about the same time transferred to him all his credits and assets of every description, including his furniture, amounting to $1,010. During this whole time it was proved that Jerome and Thomas were on the most intimate terms, the latter having been in the employment of the former, both previous to his going into business and since his failure; very soon after this transfer Thomas left the city and remained away until the following February, when he returned, and on the 5th of that month applied for the benefit of the insolvent laws.

The bill assails this payment of money and transfer of property to Jerome:—1st, because it was made by Thomas with a view and under the expectation of taking the benefit of the insolvent laws, and with intent thereby to give an undue and improper preference; and 2nd, because it was void under the act of 1834, ch. 293.

The allegations of the answer and the proof in the case are sufficiently stated in the opinion of this court, and in that of the chancellor, (JOHNSON,) which is reported in 4 *Md. Ch. Dec.*, 15. The chancellor dismissed the bill, and from this decree the complainant appealed.

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The cause was argued before LeGrand, C. J., Tuck and Mason, J.

Henry P. Brooks and *Levin Gale* for the appellant, argued:

1st. That the evidence is sufficient to establish the fact, that at the time of making the transfer to Jerome, Thomas contemplated applying for the benefit of the insolvent laws. The facts upon which we rely to show this intent and overthrow the answers are, that in September 1848 he proposed to his creditors to make *an assignment* for their benefit. In October of the same year, he makes this transfer of *all his property* to Jerome. He then left the city until the following February, when he returned, and *immediately* applied for the benefit of those laws, and returned no assets. In his answer he swears, that he did not believe himself insolvent, and that he could pay all his debts, yet the proof shows, that by his own declarations, he admitted that he could only pay a certain *per cent.* of his debts. He says he expects the mercy of his creditors, and that he did not think they would force him to take advantage of the insolvent laws, and yet by this transfer he stripped himself of all means to pay them, and had thereby so exasperated them as to leave resort to the insolvent laws as his only means of relief. *Acts of* 1812, *ch.* 77, *sec.* 1. 1816, *ch.* 221, *sec.* 6. 1845, *ch.* 139, *sec.* 2. 3 *G. & J.*, 188, *Kolb vs. Whitely.* 1 *H. & G.*, 81, *Ringgold vs. Ringgold.* 3 *Story's Rep.*, 446, *Everett vs. Stone.*

2nd. That if the evidence does not sufficiently establish an actual intention to apply, yet it shows that Thomas had, at the time, no reasonable expectation of being exempted from liability otherwise than by an application for the benefit of the insolvent laws, and that Jerome had notice of his insolvent condition, so as to render the transfer void under the act of 1834, *ch.* 293. The main question under this point is, whether Jerome had *notice* of the insolvent condition of Thomas? What is notice? Whatever is sufficient to put a party upon inquiry is good notice in equity. 11 *G. & J.*, 243, *Magruder vs. Peter.* 3 *Md. Ch. Dec.*, 493, *Ringgold vs. Bryan.* 3 *Metcalf*, 405, *Curtis vs. Mundy.* The case last cited estab-

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lishes the true test, viz., that the "notice is sufficient if it be such as men usually act upon in the ordinary affairs of life." See also, 1 *Gill*, 412, *Cole vs. Albers & Runge*. Now what are the facts *proved* in this case. Evans swears that he stated "*to Jerome*," that he wanted indemnity, because "Thomas was *generally considered insolvent, this was the general opinion in the neighborhood.*" Jerome and Thomas had been upon the most intimate business relations, both prior and subsequent to the latter's failure. In September 1848, Thomas proposed *to Jerome to give up his assets for the benefit of his creditors*. This in effect is a proposition *of insolvency*. He then conveyed to Jerome book-accounts, *notes*, credits, and all his property and effects, including *household furniture;* and Jerome says in his answer, that he offered to sign a release to Thomas upon conveyance of all his property for the benefit of his creditors. It is *impossible* to reconcile these facts with the answer of Jerome denying knowledge of Thomas' insolvent condition; and they clearly satisfy the *rule* by which an answer is to be overthrown, even if this case does not come within the *exception* to the rule laid down in 2 *Gill*, 106, *Jones vs. Belt*. As to what is the *insolvent condition*, of which the preferred creditor is to *have notice*, see 2 *Kent*, 189, 469. 16 *Eng. C. L. Rep.*, 166, *Shone vs. Lucas*. 4 *Cushing*, 134, *Thompson vs. Thompson*. 1 *Maule & Selw.*, 338, *Bayly vs. Schofield*. 3 *Story's Rep.*, 446, *Everett vs. Stone*. Insolvency, according to these authorities, means an inability to pay debts *in the usual and ordinary course of business*.

Charles H. Pitts for the appellees, argued, that the bill was properly dismissed:

1st. Because Thomas, by his answer, expressly denies that he made the payments and transfers to Jerome with a view and under the expectation of being and becoming an insolvent debtor, and that there is no sufficient evidence in the record to rebut this denial. To be an insolvent debtor under our laws, means to be in such a state as to contemplate taking the benefit of the insolvent laws. Mere inability to pay debts in the usual course of business will not suffice; there must also be an

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intent to take the benefit of the insolvent laws. This is *legal insolvency* in this State. 5 *G. & J.*, 377, *Hickley vs. Farmers & Merchants Bank.* 7 *G. & J.*, 170, *Dulaney vs. Hoffman.* The answer in regard to such intent must stand, and is *conclusive* unless contradicted by *two* witnesses, or by *one with* pregnant circumstances. 9 *Gill*, 211, *Beatty vs. Davis.* 3 *Md. Rep.*, 229, *Glenn vs. Grover & McColm.* There is not here a solitary witness to contradict the answer of Thomas upon this point, and however strong the circumstances may be, they *alone* will not do. 7 *Md. Rep.*, 537, *Feigley vs. Feigley.*

2nd. Because there is no sufficient evidence in the record to establish the fact, that Jerome had knowledge of Thomas' insolvency at the time he received the money, *choses in action* and property from him. He expressly denies in his answer that he had such knowledge. Inquiry into *obligations*, and the condition of assets *alone*, could be the *basis of such knowledge.* 1 *Gill*, 412, *Cole vs. Albers & Range.* Jerome says he did not know the amount of assets or the amount of *obligations.* "Knowledge of *insolvency as aforesaid,*" in the act of 1834, means knowledge that the party was in such a condition as left him no reasonable expectation of relief except by resort to the benefit of the insolvent laws. 7 *Gill*, 439, *Stewart vs. The Union Bank.* 6 *G. & J.*, 323, *Crawfords & Sellman, vs. Taylor.* Jerome says he did not know that Thomas was insolvent, and that when the proposition was made to transfer his property for the benefit of his creditors, Thomas assured him that he was *solvent*, and from that time to the time of his application, there is no fact brought home to *Jerome's knowledge* from which *notice* of a different condition could be inferred. The answer, therefore, must stand.

3rd. Because there was an adequate remedy at law. 9 *Metcalf*, 470, *Thayer, et al., vs. Smith.* 7 *Cushing*, 181, *Woodman vs. Saltonstall.* 8 *Ala.*, 743, *Knotts vs. Tarver.* 1 *Story's Eq., sec.* 76.

MASON, J., delivered the opinion of this court.

The questions presented on this appeal arise under the act of 1834, ch. 293, sec. 1, and are, first, whether, when Thomas

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made the transfer to Jerome, the defendant, he did so in contemplation of insolvency, or that at the time he "had no reasonable expectation of being exempted from liability or execution for or on account of his debts, without applying for the benefit of the insolvent laws?" and secondly, if so, whether Jerome "had notice of the condition of insolvency as aforesaid of said debtor?" Unless these two circumstances are established, the deed in question, as to the party claiming under it, cannot be avoided.

The defendant, Jerome, denies flatly, in his answer, that he knew of the insolvency of Thomas, and unless the force of this answer be broken by independent proof, in accordance with the rules of evidence adopted in such cases, his statement on this point must be sustained. A positive denial in an answer to the allegations of the bill must be disproved by the testimony of two witnesses, or by one witness with pregnant circumstances. We will not pause to inquire whether this case falls within the exception to this general rule, which is laid down in the case of *Jones vs. Belt*, 2 *Gill*, 106, because we think that under the rule itself, the answer of the defendant, Jerome, has been sufficiently disproved so as to destroy its force as a ground of defence against the claim of the complainant.

Evans, a competent witness, expressly states, that he "stated to Jerome that he wanted indemnity, as Thomas was generally considered insolvent—this was the general opinion in the neighborhood. Mr. Jerome did not seem surprised at witness' remark." Jerome, in reply, "informed witness that Thomas sold the goods by consent of the creditors," and that "Jerome did give the guaranty."

If this is not notice or information of the insolvency of the defendant, Thomas, we are at a loss to conjecture what other kind of notice could be furnished of such a fact. From the nature and character of insolvency, the knowledge of its existence in third parties must of necessity be to some extent conjectural or inferential, unless the information should be derived directly from the insolvent himself; and in a majority of cases, even the party is often deceived as to his own condition, and other persons are often as well, if not better, informed of his

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pecuniary circumstances than he is himself. A knowledge that a party is negotiating or compromising with his creditors, accompanied with the actual information that he was *generally considered insolvent in his neighborhood*, is, in contemplation of the act of 1834, "notice of the condition of insolvency of said debtor." Nor do we consider this as such "technical or constructive notice," as is referred to in the case of *Cole vs. Albers & Runge*, 1 *Gill*, 412, but we regard it as *an actual notice*, as much so, as such a fact ordinarily is susceptible of being the subject of actual notice.

The facts just mentioned were established by the evidence of Evans, and thus we have the positive testimony of *one witness*. But under the rule this is not sufficient, unless it be accompanied *with pregnant circumstances*. These are to be found, we think, in the close and intimate relations, both business and social, which existed between Thomas and Jerome, and in the fact, still more pregnant with an inference of the knowledge of insolvency on the part of Jerome, that Thomas proposed, previous to the preference complained of, to make an assignment of all his property for the benefit of his creditors, upon condition that they would release him from further responsibility, and *the appellee admits that the proposition was made to him and agreed to*. While we are willing to admit that a proposition from a debtor for a composition with his creditors is not conclusive evidence of insolvency, yet it is still one of the most pregnant circumstances imaginable from which insolvency can be inferred. Indeed it may not be too much to say, that it is an unheard of circumstance for a debtor to propose a composition with his creditors, unless he be in a state of insolvency.

From all the facts in the case the conclusion is irresistible to our minds, that at the time of the transfer of money and property to Jerome by Thomas, the latter was insolvent, or that he had no reasonable expectation of being exempted from liability or execution for or on account of his debts, without applying for the benefit of the insolvent laws, and that the former had knowledge of the fact.

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The transfer or assignment is therefore void, and the property which it embraced vested in the trustee, and a decree will be passed accordingly.

Decree reversed, with costs, and case ordered to the circuit court of Baltimore city.

LE GRAND, C. J., dissented, and delivered the following opinion:

I have carefully examined this case and concur in the correctness of the decree of the chancellor, and for the reasons assigned by him. I feel bound to say, however, that it is a case—apart from the stern rules prescribed by the law of evidence for the interpretation of the motives of parties—entitling the appellant to the relief sought by him; for it is impossible to suppose—when his close and intimate relation to Thomas is considered and the taking of all his property—that he was not aware of his insolvent condition; a fact which, according to the testimony of Mr. Evans, seems to have been generally believed. But Mr. Jerome denies such knowledge, and he is not contradicted as fully and in the way required by the law, and as a consequence, his denial prevails.

J. SHAAFF STOCKETT, Adm'r of THOS. M. LOCKE, *vs.* ZADOCK SASSCER.

Where a plaintiff files a replication to the plea of limitations and the defendant joins issue thereon, any irregularity as to the *time* of filing the plea is thereby *waived*.

An acknowledgment to take a case out of the statute of limitations must be of a *subsisting* debt and equivalent to an implied promise to pay, and unaccompanied by any qualification or declaration, which, if true, would exempt the party from a moral obligation to discharge it.

The *whole* admission or conversation must be taken together, as well the acknowledgment as all qualifications or conditions, and one or more *isolated* expressions should not be seized upon.

Where a party admits the debt, but at the same time resists the payment of it, by alleging that he has a set-off and that the plaintiff owes him more money, it will not remove the bar of the statute.

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Where a defendant, in conversation with the plaintiff, about the claim said in substance, that he would not plead limitations to a just debt, but that plaintiff's debt was not just, because it had been over-paid, it is not sufficient to take the claim out of the statute.

Where a debt is barred a *naked* promise *not to plead* the statute will not bind the defendant, though a promise to pay will be sustained as founded on the consideration of the original claim.

Where there are disputed accounts on both sides and each party claims a balance from the other, denying at the same time that he owes the other anything, an agreement to refer will not remove the bar of the statute.

If the acknowledgment be accompanied by such qualifying expressions or circumstances as repel the idea of an intention or contract to pay, no implied promise is created.

The acknowledgment must go to the fact, not only that the claim was originally just, but that it is *still due*.

APPEAL from the Circuit Court for Prince George's county.

Assumpsit instituted by the appellant's intestate against the appellee upon an open account, commencing in June 1845 and ending in August 1848. The suit was begun on the 29th of September 1852. The defendant appeared by attorney at the following November term of the court. The *nar* was filed on the 22nd of March 1853, containing the common money counts, accompanied by a copy of the account on which the suit was brought. The plaintiff, Locke, died in July 1853, and his death was suggested at the following November term of the court, and at April term 1854, the appellant, as his administrator, was permitted to appear and prosecute the suit. On the 4th of April 1854, the pleas of *non assumpsit* and *limitations* were filed. The docket entries in the case, however, show that the plea of *non assumpsit* had been filed on the 11th of October 1853. On the 6th of April 1854, the plaintiff joined issue upon the plea of *non assumpsit*, and on the same day entered the general replication to the plea of limitations, on which issue was joined. The record also shows that on the same day, (6th of April 1854,) the plaintiff entered a *ne recipiatur* to the plea of limitations, but this motion the court overruled, and the case was then tried upon issues joined on *both* pleas.

1*st*. *Exception*. Before the jury was sworn the plaintiff

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moved the court not to receive the plea of limitations, upon the ground that it was not pleaded in time, according to the rules of court, which are set out in the record. The *first* of these rules fixes the first Monday in March and the second Monday in September as the *plea days* of the court. The second directs, that whenever a declaration or other plea shall be filed by the rule day to any term, the clerk shall thereupon lay a rule upon the opposite party to plead or reply to the same, which rule shall go to the fourth day of the ensuing term, and "any plea of limitations not filed within the said time shall not be received by the court." He then proved that the *nar* was filed on the 22nd of March 1853, and rule plea was laid on that day, and that the plea of limitations in this case was not filed until the 4th of April 1854, and offered the docket entries in the case to establish this fact. The court (CRAIN, J.) overruled the *ne recipiatur*, being of opinion, that under the facts stated, the plea was filed in time under the rules of court. To this ruling the plaintiff excepted.

2nd Exception. The plaintiff proved the items in his account to be correct, and then proved by H. C. Scott, the facts which are stated in the opinion of this court, and then asked the court to instruct the jury, that if they found these facts to be true, the plaintiff's claim, to the extent they might find the same proved, was not barred by the statute of limitations pleaded in this case, but the court refused this prayer and instructed the jury, that if they found the facts as stated, they must find a verdict for the defendant upon the plea of limitations on the second issue. To these rulings the plaintiff excepted.

The verdict was in favor the plaintiff upon the *first* issue, and of the defendant upon the *second*, upon which judgment was given for the defendant, and the plaintiff appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

J. Shaaff Stockett for the appellant, argued:

1st. That the defendant having been laid under rule plea,

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on the 22nd of March 1853, and having plead *non assumpsit* on the 11th of October 1853, could not legally be permitted to plead limitations on the 4th of April 1854. The suit did not abate by the death of the plaintiff, and the defendant should have filed his plea of limitations by the rule day in September 1853. 4 *G. & J.*, 381, *State vs. Green.* 2 *H. & G.*, 79, *Wall vs. Wall.*

2nd. Even if the plea was properly in, yet his declaration, that "no time nor limitations was to him a bar to a just debt," and his agreement with the plaintiff to submit all the matters in dispute between them to arbitration, and the selection of a referee for such a purpose are sufficient to avoid the plea. 4 *H. & J.*, 527, *Chapman vs. Dixon.* 1 *H. & G.*, 216, *Oliver vs. Gray.* 6 *Gill*, 82, *Guy vs. Tams.* 7 *Gill*, 85, *Ellicott vs. Nichols.* 2 *G. & J.*, 296, *Keplinger vs. Griffith.* 1 *Bland*, 85, *McMechen vs. Chase.* The plea of limitations was tacitly waived by filing the plea of *non assumpsit.* 2 *Bland*, 41, 42, *Welch vs. Stewart.* In this conversation each party claimed a *balance* as due upon a proper and just settlement of their claims, and this avoids the plea. This very point was decided in 3 *Mason*, 458, *Ellis vs. Jarvis.* He expressly declares, if the debt was *just* he would pay it, and this is sufficient. 2 *Bailey's Rep.*, 425, *Lowry vs. Dubose.* An express promise not to plead the statue is, in every sense, as much an admission of the debt as the giving of a *new note.* *Conference Rep.*, (*N. C.*,) 225, *Colking vs. Thackston.*

No counsel argued for the appellee.

Tuck, J., delivered the opinion of this court.

It appears by the docket entries set out in the first exception, and also from the pleadings in the cause, that the plaintiff had filed his replication to the plea of limitations, to which the defendant had joined issue, before the *ne recipiatur* was entered to that plea. The irregularity, if any, as to the time of filing the plea was thereby waived, and we approve of the court's refusal to strike it from the rolls. 3 *Ch. Genl. Pr.*, 461, 509. *Macnamara on Nullities and Irregularities*, 17, 18, 171. 1 *Sellon's Pr.*, 102. 6 *H. & J.*, 272, *Benson vs. Davis.*

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The *second* exception was taken to the rulings of the court upon the evidence applicable to the plea of limitations. The suit is in *assumpsit* on an account running from June 1845 to August 1848, embracing numerous transactions of large amounts between the defendant and the plaintiff's intestate. *Non assumpsit* and limitations were pleaded. It appears that "in 1850, a controversy arose between the plaintiff and defendant, in the presence of the witness, as to the state of the accounts between them, in which the plaintiff claimed a balance due him of upwards of $600. The defendant said that he did not owe said balance, and that upon a just settlement the plaintiff was in his debt, and observed to the plaintiff, why do you not sue me? to which plaintiff replied, it was useless to sue as the account was out of date; the defendant answered, no time nor limitations was to him a bar to a just debt; that it was then mutually agreed between plaintiff and defendant, to submit the claims and vouchers on either side to the arbitrament of the witness, or to witness and his brother, with a mutual understanding (as witness understood when he accepted the reference) between them, that whoever was found by him indebted was to pay the indebtedness so ascertained, (although nothing was said by either party on that subject.) The defendant said, at the time of the agreement to refer, that Mr. Locke, the plaintiff, owed him, and Mr. Locke said that the balance was due him as appearing by his books." The witness also proved that no award was made.

Upon applying to these facts the principles of the law of limitations as well settled in this State, we do not perceive that the appellant can claim a reversal of the judgment. It has been often ruled in this court, that the acknowledgment to take a case without the statute must be of a subsisting debt, and equivalent to an implied promise to pay; and it must not be accompanied by any qualification or declaration which, if true, would exempt the party from a moral obligation to discharge it. *Oliver vs. Gray*, 1 *H. & G.*, 204. *Frey vs. Kirk*, 4 *G. & J.*, 509. *Brookes vs. Chesley*, 4 *Gill*, 205. *Duvall vs. Peach*, 1 *Gill*, 172. *Beltzhoover vs. Yewell*, 11 *G. & J.*, 216. *Ellicott vs. Nichols*, 7 *Gill*, 85. *Mitchell vs. Sellman*, 5 *Md. Rep.*, 377.

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It is impossible to infer any design on the part of the defendant to recognise or acknowledge liability to Locke from what occurred at the interview between them. We are not to seize upon one or more isolated expressions, but the whole admission or conversation must be taken together, as well the acknowledgment as all qualifications or conditions. Now we are told that this conversation commenced by a controversy between the parties; that is, as we suppose, that they were disputing as to the existence of any indebtment at all by Sasscer to Locke. So far from his intimating any purpose to pay the demand, he invited a suit by way of showing that he would not pay unless compelled by legal process. More than this, he averred that he had overpaid what he had owed, and that a balance was due him by Locke upon a fair statement of the accounts. The example put under the third resolution, in *Oliver vs. Gray*, is of this kind, "as if the defendant admits the debt, but at the same time resists the payment of it by alleging that he has a set-off against it, and that the plaintiff owes him more money; which virtually amounts to a denial of his liability and a refusal to pay any part of it, on grounds furnishing a sufficient moral excuse for not paying it." And the doctrine has been recently recognised in this court, (*Mitchell vs. Sellman*, 5 *Md. Rep.*, 376,) in a case more favorable to the creditor than the present.

It is supposed, however, that the declaration made by defendant, that "no time nor limitation was with him a bar to a just debt," and his agreement to refer the matters of difference to arbitration, are sufficient to avoid this defence. As before observed, the whole conversation must be taken together. The words now relied upon do not raise an implied promise, if connected with his repeated denials of any just claim against him. His language amounts to this, and nothing more:—that he would not plead limitations to a just debt, but that Locke's was not just because it had been overpaid. Even if he had said he would not rely on the plea in bar of this claim, we do not think it would have helped the plaintiff's case, because the debt being barred and the remedy gone, a naked promise not to plead the statute would not bind him, although a promise

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to pay would be sustained as founded on the consideration of the original claim.

As to the agreement to refer, it has never been decided in this State, as far as we can discover, that it will remove the bar of the statute. A distinguished judge stated, in the case of *Barney vs. Smith*, 4 *H. & J.*, 496, (without, however, referring to any authority,) that such an offer would have this effect; but that was not given as the opinion of the court: and, in *Oliver vs. Gray*, where the court, "feeling the necessity for a more certain and definite understanding of the effect of the adopted construction of the statute," laid down general rules for the practical application of the principles established by the decided cases, we do not find any intimation of the sufficiency of such an acknowledgment, although they had referred to what Lord Mansfield said in *Quantock vs. England*, as to the effect of a submission to a commission of bankruptcy by a debtor, as an answer to the plea of limitations. We suppose, however, that the *dictum* of Mr. Justice Johnson cannot, since the later decisions in this court, be considered as applicable to a case where, as here, there are disputed accounts on both sides, and each party claims a balance from the other, denying at the same time that he owes the other anything. If so applied, it appears to us that the injustice deprecated by the Court of Appeals, in illustrating the *third* rule in *Oliver vs. Gray*, could not well be avoided, if the cross demand of the defendant should be barred at the time of pleading his offset, or if he could not prove it at the trial. What would be the effect of such an agreement in a case of claim on one side only, unaccompanied by any denial on the part of the supposed debtor, we need not now decide. The present record shows a contest between the parties, each claiming a balance from the other, which, we think, must be governed by the principle, (said, in *Angell on Limitations*, 245, to be well established in England and in this country,) "that if the acknowledgment be accompanied by such qualifying expressions or circumstances as repel the idea of an intention or contract to pay, no implied promise is created;" and this view of the question is fully sustained by the Supreme Court, in the case of *Clementson vs. Williams*,

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8 *Cranch*, 72, where it was held, that the acknowledgment must go to the fact, not only that the claim was originally just, but that it is still due. And so in *Bell vs. Morrison*, 1 *Peters*, 351, "if there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified or direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay," the remedy will not be revived.

We are of opinion, that considering this whole conversation as proved by the witness, so far from there being any evidence of willingness or intent on the part of the defendant to pay the claim of the plaintiff, it was a denial of any indebtment whatever, and a refusal to pay on grounds which, if true, exempted him from obligation to pay.

Judgment affirmed.

Negro Henry Rozier *vs.* Rich'd T. Holliday.

Since the act of 1831, ch. 281, a negro of *any age* is capable of receiving freedom by will according to the purposes and provisions of that act.

Manumitted negroes may be sold for a term of years for payment of debts, where such sales will realise the sum required.

But when so sold they ultimately take their freedom *under the will alone*, and it is not necessary that the executor or administrator should execute deeds of manumission according to the terms for which they may be sold.

An executor has no power to execute deeds of manumission, unless such deeds are authorised by the will.

Where a manumitted negro is sold for a term of years to pay debts, he is under the protection afforded by the act of 1817, ch. 112, sec. 3, and if the *purchaser* sells him without executing a deed, as required by that act, he is entitled to freedom, provided the jury find fraud was intended in making the sale as provided by that act.

Appeal from the Circuit Court for Washington county.

Petition for freedom, by the appellant, against the appellee. The case was tried upon the issue of *freedom vel non*.

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In the course of the trial two exceptions were taken by the petitioner to the rulings of the court, (PERRY, J.,) both of which are fully stated in the opinion of this court. Under the rulings the verdict and judgment were against the petitioner, and he appealed.

The cause was argued before ECCLESTON, TUCK and MASON, J.

Richard H. Alvey for the appellant, argued:

1st. That under the will of Brashears, the petitioner was entitled to his freedom as against the distributees of the testator, having been born of one of the female slaves manumitted by the will in the interval between the making of the will and the death of Mrs. Brashears, during whose life the negroes were to serve, and upon whose death they were to take their freedom. That the testator, under the act of 1809, ch. 171, had the right and power to fix and determine in his will the state and condition of the petitioner, as the issue born of a female slave during a period of service, upon the expiration of which she would be entitled to freedom; and that the petitioner is entitled to maintain the state and condition declared and fixed for him by the testator's will, irrespective of age or incapacity to work. And the only persons against whom the petitioner could not claim are the creditors of the testator, in the contingency that the personal estate, without the petitioner, was insufficient to pay debts. And in this case it does not appear that an emergency existed for the sale of the petitioner for the payment of debts; and the order that was passed by the orphans court several years after the death of the testator, and after the death of Mrs. Brashears, and when a presumption should have been entertained that the debts of the estate had been paid, does not show or intimate that the payment of debts was the object in selling the petitioner. And the order of the orphans court is expressed in such vague and indefinite terms, in the absence of proof of a necessity for the sale of the petitioner to satisfy creditors of the estate, it should be treated as a nullity and as insufficient to confer upon the administrator

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any authority to sell the appellant or the other slaves; and upon regarding the order of the orphans court as a nullity, the petitioner would take his freedom under the will, by the true construction of the act of 1809, ch. 171. 7 *Md. Rep.*, 453, *Tongue vs. Negro Crissy.* 8 *G. & J.*, 165, *Wilson vs. Barnett.*

2nd. But even if the order of the orphans court was sufficient to confer competent authority upon the administrator to sell the petitioner for a term of years, yet as there was no bill of sale made according to the requirements of the act of 1817, ch. 112, sec. 3, the sale was void, or at any rate voidable; and by the terms of the act the party is entitled to his freedom, by reason of the omission to make and put on record a bill of sale for his protection. And the appellant being entitled to his freedom as against Fitzhugh, from the making of the original sale by the administrator, because of the *laches* and negligent wrong of the parties to such contract, the defendant, who claims under Fitzhugh, and by virtue of the original contract of sale, cannot stand in a better or more favorable condition with reference to such sale than Fitzhugh himself; nor will the defendant be permitted to take any benefit or advantage of the wrong and neglect of the party under whom he claims.

3rd. And if it should be thought that the petitioner takes no right under the will of Brashears, the orphans court had full power to order and direct the sale of the negroes according to the discretion of the administrator; and the administrator in this case having sold the appellant to Fitzhugh for a term of years, and Fitzhugh holding the appellant for such term and under the contract with the administrator, he could only sell and dispose of the petitioner for the unexpired period of service by complying with the requirements of the act of 1817, ch. 112, sec. 3; and for the non-compliance with such requisites of the law in selling the petitioner, he became entitled to his freedom. The question of fraud being left to the jury, as was proposed in this case by the appellant's prayer, which was rejected by the court.

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Daniel Weisel for the appellee, abandoned the first exception, under the decision in 7 *Md. Rep.*, 454, *Tongue vs. Negroes Crissy, et al.*, but upon the second exception argued: that still if the estate of Brashears was not sufficient to pay debts, as it was not, (and it was in this aspect that the orphans court passed the order for the sale of the slaves,) his slaves could not obtain their freedom, at least until all the creditors were satisfied. And if the adm'r *c. t. a.* of Brashears, acting under the order of the orphans court, sold the petitioner for *a term of years* to pay debts, it was incumbent upon him to execute to the petitioner *a deed of manumission, giving his freedom after a particular time, witnessed, acknowledged and recorded, according to the act of Assembly in such case provided.* See *Act of* 1796, *ch.* 67, *sec.* 29. This not having been done, or there being no proof of it in the cause, no bill of sale, as required by the act of 1817, ch. 112, sec. 3, from Fitzhugh to Holliday was necessary. The petitioner must first have been legally entitled to his freedom, before he could appeal to the law of 1817 for his protection, or to give him his freedom before the proper time, by reason of any omission to observe its requirements. In this aspect of the case the refusal of the court to instruct upon the prayer of the petitioner was correct; and would be correct notwithstanding the law of 1831, provided there were debts which required the sale of the petitioner, and no valid deed of manumission were made by the administrator for him when sold under the order of the orphans court:—for in such case he could not assert his freedom simply under the will, for the will made him free on the *death of his mistress;* whereas the law, there being debts and no sufficiency of other personal assets to defray them, held the petitioner *beyond that time, and even for life.* Therefore the necessity, also, of a deed of manumission. In case of a reversal, this issue will be more distinctly made (the necessity of resorting to the slaves to pay debts) on the trial under the *procedendo.*

Tuck, J., delivered the opinion of this court.

The appellant claims his freedom under the will of Van S.

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Brashears, which was executed on the 20th day of October 1832, and provided that all his property, real, personal and mixed, should belong to his wife, Maria, for her sole and exclusive use and benefit, but that at her death all his slaves then existing, and those that might be born of them thereafter, should then cease to be slaves, and ever thereafter remain free. The will was admitted to probate on the 31st day of October 1832. It was proved on the trial that the petitioner was born after the death of the testator, and was the son of Henry and Mary Rozier, slaves of the testator at his death; and that the widow of the testator died in the month of October or November 1837, when petitioner was about four or five years old; and that a negro boy is not able to work and gain a sufficient maintenance and support until he is ten or twelve years of age.

On the 9th January 1838, and after the death of the widow, the orphans court passed an order, that the administrator of Van S. Brashears "proceed to make such disposition of the negroes belonging to the estate as will enable him to close the estate of deceased with the court." The administrator sold the petitioner, then in his fifth year of age, to Benjamin G. Fitzhugh, to serve from the 1st of March 1838 until the 1st of March 1860, who afterwards sold him to the appellee in this case for the residue of the term.

The defendant below, by his counsel, offered a prayer, the point of which was, that if the jury believed from the evidence that the petitioner was not more than four or five years of age at the time of Mrs. Brashear's death, when his freedom was to commence under the will, and that he was not then able to work and gain a sufficient livelihood and maintenance, then the petitioner was not entitled to his freedom under the laws of Maryland, and the verdict must be for the defendant, which prayer the court granted.

The petitioner also prayed for an instruction upon the whole evidence, the point of which was, that if the jury should believe there was no bill of sale from Fitzhugh to Holliday, duly executed and acknowledged, specifying and designating the true time or condition of the servitude of the petitioner and the residence of the purchaser, then the petitioner was entitled

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to his freedom, the jury having the right to decide whether there was any fraud intended in the sale of the petitioner, and if no fraud intended, then the omission to make the bill of sale would not entitle the petitioner to his freedom. This prayer the court rejected, and the petitioner appealed.

This case was tried in March 1855. Since then we have decided that under the act of 1831, ch. 281, a negro of whatever age is capable of receiving freedom, by will, according to the purposes and provisions of that act. It follows, therefore, as conceded by the appellee's counsel, that the ruling of the court below on the first exception must be reversed. *Tongue vs. Negro Crissy, et al.*, 7 *Md. Rep.*, 453.

The second exception involves the application of the act of 1817, ch. 112, sec. 3, to cases where negroes entitled to freedom under a will are sold, for purposes of the estate, for terms of years. That they may be sold for the payment of debts and for terms of years, where such sales will realize the sum required, see *Allein vs. Sharp*, 7 *G. & J.*, 96. But do they ultimately take their freedom under the will, or is it necessary, as contended by the appellee, for the executor or administrator to execute deeds of manumission according to the terms for which they may be sold? Doubtless by force of the will alone. The general principle is, that an executor has no power to execute deeds of manumission. *Anderson vs. Garrett*, 9 *Gill*, 120. The case is different, however, where such deeds are authorised by the will. *Pearce vs. Van Lear*, 5 *Md. Rep.*, 85. If, in cases like the present, a deed was necessary to confer freedom, the failure or neglect of the administrator or executor to perform this duty might deny to the negro all benefit of the bequest, by the want of competent proof. The law does not subject persons in this predicament to any such risk. The right is derived under the will, limited in its enjoyment by the term of service that may be imposed in the due administration of the estate; and when the time expires, as may be shown by the account of sales or otherwise, the party can claim the usual certificate of freedom from the register of wills. Hence it follows that at the time the appellee purchased the appellant from Fitzhugh, he was in a condition which

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secured to him the protection afforded by the act of 1817, "as a servant or slave entitled to freedom after a term of years, or particular time," subject, of course, to the finding of the jury on the question of fraud in making the sale, as provided by the act. Consequently the exception on this point was well taken.

We express no opinion on the effect of the order of the orphans court, passed 9th January 1838, nor as to the *onus* of proof touching the condition of the estate, as these questions are not presented by this record. On these points see *Allein vs. Sharp*, 7 *G. & J.*, 96; *Wilson vs. Barnett*, 8 *G. & J.*, 159, and 9 *G & J.*, 158.

Judgment reversed and procedendo ordered.

John T. Edwards, Adm'r of Normand Bruce, *vs.* Upton Bruce.

An application to the orphans court to *revoke* letters of administration can only be made within the same time after the party applying has *knowledge* that letters had been granted as that provided by law, within which an *original application* for letters is to be made.

The courts, upon the principle of analogy, will, by construction, apply express statutory restrictions, in regard to time, to cases of similar character, where no such express legislative provisions exist.

This principle is peculiarly appropriate to testamentary affairs, because the testamentary laws clearly manifest an intention to guard against all needless delay, and secure as prompt and speedy settlements of estates as practicable.

Decisions in which *no opinions* are filed will not be regarded as authority in other cases, unless the similarity is so apparent as to leave scarcely a doubt in regard to the propriety of applying the principles clearly shown to have been *necessarily* involved in and settled by the questions actually decided.

Cross-Appeals from the Orphans Court of Allegany county.

Normand Bruce, of Allegany county, died intestate, on the 7th of October 1854, leaving a widow, brothers and sisters, a mother, but no child, grandchild or father. The widow, on

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the 15th of October 1854, renounced in writing her right of administration upon the estate, "desiring at the same time that letters of administration may be granted and committed unto John T. Edwards," and on the same day four of the brothers and sisters filed their written assent to the appointment of Edwards. Letters of administration were accordingly granted to Edwards on the 17th of October 1854.

On the 4th of June 1855, Upton Bruce, one of the brothers of the intestate, living in the county, filed his petition, insisting that upon the renunciation of the widow and the other parties above named, the right to administer passed to him, and that he ought to have been cited to appear before administration could be granted to a stranger, and praying that the letters granted to Edwards may be revoked and letters granted to him.

Edwards answered this petition, insisting that the widow renounced solely upon the ground that he should be the administrator, and that she refused to renounce until it was distinctly understood, that all the brothers and sisters of the intestate assented to his appointment, and that the written renunciation of several of the brothers and sisters was filed by Henry Bruce, who, at the time, professed to act for all the brothers and sisters of the deceased, including Upton Bruce, the petitioner.

The widow then filed her petition, stating that she was induced to decline the administration upon the distinct understanding that Edwards was to be the administrator, and insisting that if the letters of Edwards are revoked letters shall be granted to her, and for this purpose she retracts her renunciation.

Upon these petitions and answers a large mass of testimony was taken, upon which various questions were raised and discussed in this court, which need not be stated, inasmuch as the ground upon which the decision of this court is based renders it unecessary, all the facts material to an understanding of the opinion of this court being stated therein.

On the 10th of July 1855, the court below ordered the letters granted to Edwards to be revoked, and that the widow be

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authorised to retract her renunciation, "and that upon her retraction letters of administration will be granted to her." From this order both Edwards and Upton Bruce appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

George A. Pearre for Edwards, argued, that Upton Bruce having been informed on Christmas day 1854, that Edwards had been appointed administrator, and at that time having employed Henry Bruce as his counsel, "in relation to the settlement of the estate of Normand Bruce generally," and Henry Bruce, as his counsel and in his name, having, in January 1855, filed a petition in the orphans court treating Edwards as administrator, touching the sale of the personal estate to the widow, and having from Christmas 1854 to the 4th of June 1855, delayed all proceedings to have the letters of Edwards revoked, has *waived*, in legal contemplation, his right to the administration. As soon as informed of the fact that the widow and the other heirs had consented to the appointment of Edwards, it was his duty *then*, without a delay of over five months, to have taken the proper steps to get the administration into his own hands. It may be admitted, for the sake of the argument, that as to Upton Bruce the letters were improvidently issued, and yet the intervening facts above indicated may render it wholly improper and illegal to revoke the letters. The grant of letters improvidently is not a *void* act, but merely voidable. This is evident from the fact that they must be revoked before other letters are granted. Being only a voidable act any acquiescence, either *positive* or *negative*, is a confirmation of the act. In this case Upton Bruce positively treated Edwards as administrator, by filing his petition in the orphans court, and negatively by delaying five months to take any steps to have the letters revoked. In such a case the maxim applies, *qui tacet consentire videtur*. Suppose Upton Bruce had been advised by Henry, on Christmas day, that the widow and all the brothers and sisters had renounced the administration; and suppose that letters had not

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been granted to Edwards until the 4th of June 1855, surely Upton Bruce, with this notice, not having come forward to take administration would be considered as having renounced or given up his right. The same facts which would justify the court in assuming his unwillingness to take the letters would surely authorise the presumption of *waiver* of his right, knowing for the same length of time the court had granted the letters and having taken no steps to set them aside. 6 *Md. Rep.*, 472, *Lefever vs. Lefever*. The law neither requires a written renunciation or a regular summons to be issued by the orphans court to enable that court to make an appointment of a person not first entitled. By the act of 1798, ch. 101, sub-ch. 5, sec. 7, the proceedings to exclude those *prima facie* entitled to administration "shall, in all respects, be the same, as hereinbefore directed, for excluding any person who shall be named in a will as executor;" and by sec. 23 of the same sub-ch., if the parties entitled "refuses to appear, on proper summons *or notice* administration may be granted at the discretion of the court." *Notice* here means notice in fact, no matter how acquired, not notice by a summons or other legal precept served by a law officer. If so the word "*summons*" would alone have been used, as that is the notice by a law officer or formal notice. In the sections of this act of 1798, relating to executors, the law does not require a written renunciation or a regular summons to give the orphans court the power to appoint a person not named in the will. These provisions show that summons was only to give *notice*, and where *notice* exists summons is superfluous.

We say, therefore, that the orphans court could not, after so long a lapse of time after actual notice to Upton Bruce, properly revoke the letters granted to Edwards. Upton Bruce should have appealed from the order of the court appointing Edwards, and not have instituted a new proceeding. At all events, such a proceeding to revoke the letters should not be permitted after the time limited by law for appeals from decrees or orders of the orphans courts. This time is thirty days by the act of 1818, ch. 204. This court say, in 6 *Md. Rep.*, 478, "if parties could open decrees and judgments on appeal

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in this indirect way, it would virtually amount to a repeal of the laws limiting the time within which appeals should be taken, and would lead to interminable litigation." This proceeding is in the nature of a bill of review, which, by analogy, the courts have limited to the same time allowed for an appeal. From decrees of the higher courts this time is nine months. From decrees of the orphans court thirty days. By analogy, then, this proceeding, in the nature of a bill of review, ought not to be allowed after thirty days from the appointment of the administrator, or at most, as Upton Bruce in this case had notice of the appointment of Edwards, at Christmas 1854, he should be limited to filing his bill of review to the time allowed for an appeal, counting from that time. In the case in 9 *Gill*, 465, *Owings vs. Bates*, which was an application to revoke letters of administration, it was made within the thirty days. So also in 6 *G. & J.*, 349, *Ward vs. Thompson*. In this case it was over five months after Upton Bruce had knowledge of the previous grant of letters to Edwards. In 7 *G. & J.*, 207, *Berrett vs. Oliver*, it was expressly decided, that the bill in that case should have been filed in nine months after the passage of the act of Assembly, *that being the time fixed by the act of Assembly for limiting appeals from decrees or orders of the Court of Chancery*. See also 11 *G. & J.*, 137, *Oliver vs. Palmer & Hamilton*. These cases show that the courts will, by analogy, apply express statutory restrictions, in regard to time, to similar cases, where no such express legislative power exists, and are *conclusive* on this point.

William Price for Bruce, argued, that the letters to Edwards were improvidently and improperly granted, so far as Upton Bruce was concerned. He never *renounced*, and never *consented* that the administration should go to Edwards. He is one to whom the law gave the right of administration, and was passed over without proper summons or notice, and letters given to a stranger. The act of 1798, ch. 101, sub-ch. 5, secs. 10 to 15, designate the persons in their order who shall be entitled to administration, and sub-ch. 5, secs. 7 and 23, and sub-ch. 4, sec. 1, show that a person having the right to administer

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and residing within the State, is entitled to summons and notice. Here Upton Bruce, though living in the county, was neither notified nor summoned. It is the duty of the orphans court, when administration has been improvidently or improperly granted, to revoke the letters and give the administration to the person entitled. 2 *H. & G.*, 51, *Raborg vs. Hammond.* 9 *Gill*, 465, *Owings vs. Bates.* 8 *G. & J.*, 79, *Hoffman vs. Gold.* No time is fixed by the statute within which such an application must be made, and the courts have no authority to apply any limitation of time upon any supposed analogy. We therefore say, that the petition of Upton Bruce filed in this case was filed in time, and should have been granted. The letters could only be revoked for the purpose of granting them to him. They could not be revoked for the purpose of granting them to the widow, because she agreed that Edwards should be appointed. The decision of the court below is, therefore, manifestly wrong and must be reversed.

(The argument on the other points in this case, as to the right of the widow to *retract* her renunciation and her power to *delegate* the authority to administer to Edwards, need not be stated, as no opinion was pronounced on them by this court.)

ECCLESTON, J., delivered the opinion of this court.

On the 10th of July 1855, the orphans court of Allegany county passed an order revoking the letters of administration previously granted by them to John T. Edwards, on the personal estate of Normand Bruce, deceased, and authorising Elizabeth Bruce, the widow of the deceased, to retract her renunciation of her right to letters of administration on said estate. The order likewise made provision, that upon such retraction letters would be granted to the widow. From this order cross-appeals were taken.

The view we propose to take of this case, relieves us from the necessity of saying anything in regard to many of the points presented in argument.

The counsel for Edwards says, that if Upton Bruce had at any time a right to claim a revocation of the letters, he had waived that right by lapse of time before his application to

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have the letters revoked was made. And in this we think he is right.

The letters were granted on the 17th of October 1854. It is in proof, that Upton Bruce had a knowledge of that fact on the 25th of December following. It likewise appears, that in January 1855, Henry Bruce appeared in the orphans court, as counsel for the brothers and sisters of Normand Bruce, deceased, including Upton, and in their names and in his own, filed a petition against John T. Edwards, administrator of Normand, and Elizabeth Bruce, the widow, touching the sale of the personal estate of the deceased to the widow by the administrator, and other matters, which petition was subsequently withdrawn by consent.

The petition, asking for a revocation of the letters granted to Edwards, was not filed until the 4th of June 1855. Because of the lapse of time between the date of the letters and the filing of this petition, it is contended that the court were wrong in granting the prayer of the petition. This, it is said, is only relying upon a principle which has been adopted in other cases, based upon the analogies of the law. And because the right of appealing from the order granting the letters is limited by law to thirty days, this application to revoke the order should have been filed within the same time after the party had knowledge that the letters had been obtained.

We think the principle of analogy should apply in the present case, but it applies with more propriety to the time provided by law within which an original application for letters is to be made than to the time of taking an appeal.

An examination of cases in which the principle relied upon has been recognised, will show the correctness of its application in the present instance.

In *Berrett vs. Oliver*, 7 *G. & J.*, 191, by legislative enactment it had been attempted to vacate and annul certain deeds and decrees, but the court held the law to be unconstitutional for such a purpose. Admitting it, however, to be unconstitutional in that respect, still the counsel of Mrs. Berrett contended the law might be considered as only operating upon the remedy by which the rights of the parties were to be adjudicated, so as

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to remove the conclusiveness of the decree, and to authorise its reversal by such a bill of review as that then under consideration. But the bill having been filed by Mrs. Berrett more than two years after she had information of her husband's death, the court thought it too late. And although there is no provision in the act in regard to time, the court say, "within what time must that bill have been filed? In nine months after the passage of the act of Assembly, if preferred by Berrett and wife; and within nine months after the death of Berrett, or the knowledge of that event had reached her, if filed by Mrs. Berrett after discoverture; that being the time fixed by the act of Assembly limiting appeals from decrees and orders of the Court of Chancery."

In *Oliver vs. Palmer & Hamilton*, 11 *G. & J.*, 137, more than nine months after the decree had been passed, a petition was filed in chancery, alleging that the decree was obtained by mistake, which was not discovered by the petitioners until after the time appointed for regularly taking an appeal therefrom, and praying they might be permitted then to appeal. To the petition depositions were annexed, stating that the decree was obtained by mistake. Upon a motion to dismiss, it was insisted by the appellees that the appeal was taken too late, being nearly six months after the decree was brought to the knowledge of the appellants; but the court thought otherwise, because where fraud or mistake is alleged, there is no positive limitation in the act as to the time when the appeal shall be taken. The act referred to is, 1826, ch. 200, sec. 14, in which it is provided, that all appeals from decrees of the Court of Chancery shall be prosecuted within nine months from the time of making such decrees, and not afterwards, "*unless it shall be alleged on oath or affirmation that such decree was obtained by fraud or mistake.*" This language, most certainly, does not impose any restriction as to the time when an appeal shall be taken in cases of alleged fraud or mistake; and whilst the court are willing to rely upon the absence of any express limitation in such cases, so as to sustain the appeal before them, because the appellants had knowledge of the mistake for only six months, nevertheless, we understand

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them as holding, that if instead of nearly six, it had been over nine months, the appeal would have been too late. Such is evidently their meaning when they say: "A just construction of the act would allow him the same time to appeal, after the discovery of the fraud or mistake, that all other persons had under the act."

In *Hitch vs. Fenby*, 6 *Md. Rep.*, 224, a bill was filed for the purpose of opening and vacating a former decree. Various grounds were relied upon, and amongst them usury. In dismissing the bill the court say, "If at any time after the decree was enrolled and the term had passed, the complainant had a right to open the decree because of its being based upon a claim affected by usury, we think he could only have done so within nine months after the decree, or within the same time subsequent to his being informed of the usury." The facts showing that before and at the time of the decree, the complainant had knowledge of the transactions constituting the alleged usury, and his bill not having been filed for some seven years thereafter, it was held too late. In support of their view the court refer to the cases of *Berrett vs. Oliver*, and *Oliver vs. Palmer & Hamilton*, and also to *Alexander's Chancery Practice*, 182.

These authorities show the willingness with which courts, upon the principle of analogy, will, by construction, apply express statutory restrictions in regard to time, to cases of similar character, where no such express legislative provisions exist. And in reference to testamentary affairs this principle is peculiarly appropriate, because in our testamentary laws the legislature has clearly manifested an intention to guard against all needless delay, and to secure as prompt and speedy settlements of the estates of deceased persons as practicable. For which purpose much pains has been taken to provide for the granting of letters with promptness.

The only cases we have seen in which the right of the orphans court to revoke letters, because improvidently granted, has been sustained, are *Ward vs. Thompson*, 6 *G. & J.*, 349, and *Owings vs. Bates*, 9 *Gill*, 465. In each the application to revoke was made within thirty days after the letters had been granted.

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Robey vs. Hannon, 6 *Gill*, 463, is not a case in which any question arose as to the revocation of letters. A will had been admitted to probat and letters testamentary granted. After which an instrument in the form of a deed, at the instance of the executors, was also admitted to probat as a testamentary paper. Some years subsequently, Robey, (the appellant,) filed a petition praying that the probat of the deed as a testamentary paper might be revoked and vacated, which petition was dismissed by the orphans court, and the Court of Appeals reversed that decision, but filed no opinion. They decreed, however, the deed not to be a testamentary paper, that it should not have been admitted to probat and record, and that the order of the orphans court, "directing such indenture to be recorded, is null and void."

In the argument of the appellant's counsel various points were presented, one of which was, that under the circumstances of the case their client, (Robey,) could not have appealed from the proceedings of 1839, admitting the deed to probat. If the court adopted that view, then there was no foundation on which, from analogy, the limitation of time, in regard to appeals, could be applied to the case before them. But in the absence of an opinion of the court, we are unwilling to speculate or conjecture as to what were the reasons which induced their decision. And we are at all times indisposed to consider such cases as authority in others, except where the similarity is so apparent as to leave scarcely a doubt in regard to the propriety of applying the principles clearly shown to have been necessarily involved in, and settled by, the questions actually decided.

The act of 1798, ch. 101, regulates the time within which persons entitled to letters testamentary or of administration shall apply for such letters; and on failure to make application within the time prescribed the party may be excluded, and the person next entitled may be appointed; and in some cases of such failure the court have a discretion in regard to the appointment. The proceedings proper for excluding an executor are prescribed in sub-chapter 3. And in sub-chapter 5, sec. 7, it is provided, that "the proceedings to exclude such as *prima*

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facie appear entitled to the administration of the estate of an intestate, shall in all respects be the same as hereinbefore directed for excluding any person named in a will as executor or executrix." The 23rd sec. of the latter sub-ch. provides: "If there shall be neither husband nor wife, nor child, nor grandchild, nor father nor brother, nor sister nor mother, or if these be incapable or decline, or refuse to appear on proper summons *or notice*, or if other relations and creditors shall neglect to apply, administration may be granted at discretion of the court."

By the 5th section of sub-ch. 3, where a sole executor is out of the State when the will is authenticated or proved, he is allowed six months to come in and file his bond. But if he returns to the State within the six months "in order to expedite the granting of letters there may be a summons, and the same proceedings thereon as if he or she had been in the State at the time of authentication and probat, and upon the said proceedings letters of administration may be granted before the expiration of six months." And the same section also declares, "It shall not be necessary to proceed by summons as aforesaid, in case the party be as aforesaid, out of the State at the time of authentication or probat, and shall return as aforesaid; but letters of administration, after the expiration of the said six months, may be granted, without such proceeding, by summons against the executor or executrix so returning."

Whilst absence from the State allows the executor six months to appear and file his bond, he will forfeit his right to letters within a much shorter period if in the State when the will is admitted to probat. If present at the probat he must file his bond in thirty days, unless he thinks proper to take a certified copy of the will for the purpose of obtaining letters in a county where the will was not proved; in which case he may be allowed seventy days instead of thirty. See sub-ch. 3, sections 2 and 3.

Under the 4th sec. of the same sub-ch., when the executor is not present at the probat a summons may issue against him, returnable not less than twenty, nor more than sixty days after date; and if it is returned "summoned," and he shall not

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appear accordingly, or appearing shall not, within twenty days thereafter, file his bond; or if two summones shall be returned "*non est*," and he shall not appear, according to the tenor of the second summons, or appearing shall not, within twenty days thereafter, file a bond, letters of administration may be granted. But in case of sickness, or accident, or reasonable excuse, the court may, at discretion, allow a further time, not exceeding forty days after such return or appearance.

Thus it will be seen that the period of time between the date at which Upton Bruce had knowledge of Edwards' letters and the filing of this petition, is much longer than that which is required to exclude an executor from his right to letters, in consequence of his failing to appear and file his bond after being summoned, or after two summonses returned *non est*, when he is not out of the State. And in this instance Upton Bruce was in the State.

After letters of administration have been granted, and a will is proved according to law, in which an executor is named, the executor is required to apply for letters testamentary within thirty days thereafter, according to the provisions contained in the 4th sec. of sub-ch. 5.

Even considering the filing of the petition in January, in which Upton Bruce was a party, as the date when he received notice of Edwards' letters, he had notice more than four months before his application to have them revoked. And believing, as we do, that under the 7th and 23rd sections of sub-ch. 5, in connection with the other provisions of the act of 1798, which have been referred to, a party, *prima facie* entitled to the administration of the estate of an intestate, may be excluded from that right after "proper summons *or notice*," in case he fails to appear and claim his right, even for a less period than four months, it would seem to be proper that the petitioner, Bruce, should not be allowed to apply for a revocation of the letters in the present case after he had knowledge of them, and by a proceeding in court had recognized their existence upwards of four months previous to making his application.

Adopting the doctrine clearly recognized in *Berrett vs.*

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Oliver, and the other cases of like character referred to, we think the order revoking the letters granted to Edwards should be reversed. The costs however in both courts must be paid out of the estate of the deceased.

These views necessarily dispose of both cases before us under cross-appeals; for if the orphans court erred in revoking Edwards' letter they had no authority to allow Mrs. Bruce to retract her renunciation. The order must, therefore, be reversed on both appeals. But we do not express any opinion as to whether the declaration by the court, of their intention to grant letters to the widow, in case she should retract her renunciation, is a subject proper for revision under an appeal.

Order reversed.

JOHN HURST and JOHN S. BERRY, *vs.* JOHN R. HILL.

After dissolution, one partner cannot, by a new contract in the name of the firm, bind his late partner, even when the consideration is a debt of the firm.

One partner cannot, after dissolution, impose new obligations on the firm nor *vary* the form or character of those already existing; he cannot *change* the form of the indebtment by giving a *new note* in the name of the firm.

Where a firm note was, after dissolution and after it was past due, renewed by one partner giving a new note in the firm name, such new note is a *new contract* which cannot bind the other partner.

A creditor cannot so deal with one of his debtors in a joint contract as to prevent or *delay* the latter's right to contribution against his co-debtor, in case of payment of the debt.

Where the verdict was against the plaintiffs on the plea of *non assumpsit*, the judgment will not be reversed on his appeal for any error in an instruction in regard to the plea of *limitations*.

Where limitations and *non assumpsit* are pleaded, a prayer on the part of the plaintiffs overlooking the evidence under the plea of limitations, and directing the jury to find for him, though they may believe the facts set up as a bar under that plea, is defective in not being confined to the plea of *non assumpsit*.

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APPEAL from the Circuit Court for Anne Arundel county.

Assumpsit, brought by the appellants, on the 30th of July 1853, against the appellee and Levin Gardner, on a promissory note of John R. Hill & Co. in favor of the plaintiffs, for $904.65, dated the 8th of April 1850, and payable in six months. The declaration contained a special count upon the note and the usual money count. Gardner suffered a judgment by default, and Hill pleaded *non assumpsit* and *limitations*.

1*st Exception*. The plaintiffs proved that the defendants, Hill and Gardner, constituted the firm of John R. Hill & Co., which was dissolved shortly after May 1848; that the debt to the plaintiffs was originally contracted on partnership account; that the account offered in evidence exhibits the particulars and the consideration of the original debt, which account was closed on the 6th of May 1848, by a note in the firm name of John R. Hill & Co., at five months, for $791.56; that this note from time to time was renewed in the firm name, with interest added, until the 8th of April 1850, when the note in suit was given also in the firm name; that the original note and all the renewals were given by Gardner, and Hill was not present on any occasion; that for some time after the dissolution, Gardner continued the business and continued to deal with the plaintiffs. The defendant then asked the following instruction to the jury:

That if they find from the evidence that the last note executed by Gardner was made by him in the name of the firm, on the 8th of April 1850, then it is no such acknowledgment of indebtedness as will relieve this suit from the bar of the statute of limitations, upon the ground that the acknowledgment must be construed as being made on the 8th of April 1850, and the suit not being instituted until the 30th of July 1853, more than three years had elapsed from the date of the acknowledgment prior to the institution of the suit. This instruction the court (BREWER, J.) gave, and to this ruling the plaintiffs excepted.

2*nd Exception*. The defendant then offered, under the plea of *non assumpsit*, evidence tending to prove his infancy during

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and after the dissolution of the partnership; and the plaintiffs then asked the following instruction:

If the jury find that the note sued on was given by Gardner; that Gardner, with the defendant, Hill, formed the partnership of John R. Hill & Co.; that the consideration of the note was a debt due from said partnership for goods furnished during its continuance, and in renewal of a previous note for the same debt of the 6th of May 1848; then the plaintiffs are entitled to recover, although they find that during the existence of said partnership the said Hill was an infant, unless they further find that within a reasonable time after he arrived at age he gave notice of the disaffirmance of said debt. This instruction the court refused, and to this ruling the plaintiffs excepted.

The verdict was for the defendant upon *both issues*. The plaintiffs then moved for a new trial, because the verdict was against the evidence in the cause and against law. This motion the court overruled and gave judgment for defendant, from which the plaintiffs appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

Brice T. B. Worthington and *Frank H. Stockett* for the appellants, argued:

1st. That the promise by Gardner, in the name of the firm, on the 8th of April 1850, to pay the debt six months thereafter, was effective to give a right of action to the plaintiffs only at the expiration of that time and not at the *date* of the note, and the suit having been brought within three years after the right of action accrued, the plea of limitations could not be maintained. One partner has the power to *revive* a debt by a promise after dissolution, (7 *Gill*, 85, *Ellicott vs. Nichols*,) and much more to *continue* the liability before the debt is barred. 11 *Pick.*, 400, *Cady vs. Shepherd*. 7 *Greenlf's Rep.*, 26, *Getchell vs. Heald*. 1 *Peters*, 351, *Bell vs. Morrison*. See also on this point, *Story on Part.*, *secs.* 325, 326, 328. 1 *Taunt.*, 104, *Wood vs. Braddick*. 7 *Wend.*, 441, *Patterson vs. Choate*. 1 *H. & G.*, 471, *Murdock vs. Winter*. 2 *Hawks.*,

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209, *McIntire & Co., vs. Oliver.* 2 *Dev. & Batt.*, 371, *Full vs. Sheckell.* 6 *Gill*, 82, *Guy vs. Tams.* The acknowledgment must contain a promise, either express or implied, (4 *G. & J.*, 509, *Frey vs. Kirk,*) and it is the latter which gives the right of action, the acknowledgment being only *evidence* of the *promise.* The note sued on was, therefore, an acknowledgment *evidencing* a promise to pay at its *maturity*, and from that time only the statute began to run, and not from the date of the note.

2nd. The law of the plaintiffs' prayer in the second exception is correct, and this instruction should have been granted. *Story on Part.*, *sec.* 7. 8 *Taunt.*, 35, *Holmes vs. Blogg.* 5 *Barn. & Ald.*, 147, *Goode, et al., vs. Harrison.* *Bissett on Part.*, 2.

A. B. Hagner and *A. Randall* for the appellee, argued:

1st. That the question raised in the first exception as to the effect of the statute of limitations, is not *now* material to the argument of the cause in this court, because the jury have found a verdict for the defendant upon the issue of *non assumpsit*, and the appellants have not therefore been *injured* by any ruling as to the plea of limitations, even if such ruling were erroneous, and this court will not reverse the judgment therefor. 1 *Md. Rep.*, 115, *Mudd vs. Harper.* 4 *G. & J.*, 467, *Berry vs. Harper.* 4 *Md. Rep.*, 426, *Cross vs. Hall.* 5 *Do.*, 433, *Stewart vs. Spedden.* But there is no error in this ruling, because the note sued on is a *new contract* made *after dissolution* by one partner in the *name of the firm*, by which he seeks to bind his late partner, which he has *no power* to do, even where the consideration is a debt of the firm. *Collyer on Part.*, *sec.* 540, *note* 2, *sec.* 545. *Story on Part.*, *secs.* 322, 323, 324, 329. *Bissett on Part.*, 91, 97. *Carey on Part.*, 186, 187. 7 *Gill*, 100, *Ellicott vs. Nichols.* 1 *Hill*, 572, *National Bank vs. Norton.* 1 *Md. Rep.*, 206, *Dorsey vs. Dashiell.*

2nd. As to the plaintiff's prayer in the second exception: It is defective in form in many particulars. It takes no notice of the plea of limitations, but directs the jury to find for the plaintiffs notwithstanding they may find the debt barred by the statute. It does not require the jury to find any debt due the

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plaintiffs or that a note was given to them. It assumes the power of Gardner to make the note so as to bind the firm after dissolution. It takes from the jury the right to consider the evidence offered by the plaintiffs themselves, showing that the debt was Gardner's *individual debt*. It places the burden of proof on the wrong party, for the *onus* of showing affirmance is on them and not on him to show disaffirmance. There is no evidence to show when Hill attained age, or that he ever knew of the existence of this debt which he is thus called upon to disaffirm, but on the contrary they have proved that he knew nothing of it. These are the objections to the *form* of the prayer. There are objections also to the *law* of it. This is the case of a dissolution of the partnership during the infancy of the defendant, who *continued* an infant after the dissolution. Before the contract can be binding upon the infant it must be *affirmed* by him, and the *onus* of showing such affirmance is on the party who seeks to enforce the contract against the infant. *Bissett on Part.*, 2. *Collyer on Part.*, *secs.* 12, *note*, 528, 529. *Story on Part.*, *sec.* 7. *Carey on Part.*, 4. 2 *Hill*, 120, *Bigelow vs. Grannis*.

Tuck, J., delivered the opinion of this court.

The point to be considered on the defendant's prayer is, whether, upon the proof stated, he was liable on the note made by Gardner, in the name of the firm, on the 8th of April 1850, after the partnership had been dissolved.

Upon the propriety of this instruction we entertain no doubt. The decided cases show very clearly, that one partner cannot, by a new contract, in the name of the firm, bind his late partner, even when the consideration is a debt of the firm. In *Ellicott vs. Nichols*, 7 *Gill*, 100, the Court of Appeals said, "the doctrine is fundamental, that from the moment the partnership terminates the partners become distinct persons with respect to each other, and that, consequently, one partner can have no power to subject, by his acts or declarations, his former associate to new obligations, burdens or responsibilities;" and in 3 *Kent's Com.*, 62, "One partner cannot impose new obligations on the firm, nor vary the form or character of those

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already existing." The same doctrine was announced in *Bell vs. Morrison*, 1 *Peters*, 351. Conceding that he may acknowledge a debt of the partnership after the dissolution, and thereby continue the liability of the other partners, where the cause of action is not barred by the statute of limitations at the time of the acknowledgment, it is certain that the claim can be enforced only in the form in which the debt stood at the dissolution. *Carey on Partnership*, 187, 188. *Collyer, secs.* 540, 541. *Story on Part., secs.* 322, 323, 324. He cannot change the form of the indebtment by giving a new note in the name of the firm. *Perrin vs. Keene*, 19 *Maine*, 355. *National Bank vs. Norton*, 1 *Hill, N. Y. Rep.*, 572.

That the note now sued is a new contract is very plain. The note held by the plaintiffs when the firm was dissolved was past due when the present one was given by Gardner to them. By it the time was extended, without the consent of Hill, which not only prevented him from paying the debt, if he had sought to do so, before the expiration of the time limited in the note for payment, unless the plaintiffs had chosen to receive payment in advance; but if he had paid he could not have enforced his claim for contribution against Gardner until after the day of payment. A creditor cannot so deal with one of his debtors in a joint contract as to place the co-debtor in such a predicament.

In either aspect of the question the appellant must fail. If reliance be placed on the note as giving a new cause of action, as of the time limited for its payment, the answer is, that Gardner had no authority, under the law, to bind Hill by this new contract. And if they accepted the note as an acknowledgment of the original debt, they must be bound by the application of the statute, at the expiration of three years from its date, for it certainly cannot operate with any greater effect as against this appellee; and, according to this view, it is conceded that the plaintiffs suit was barred.

Independently of these views the judgment could not be reversed on this instruction, because, according to the record, the plaintiffs failed upon the issue on the plea of *non assumpsit*. *Cross vs. Hall*, 4 *Md. Rep.*, 426.

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What has been said in reference to the defendant's prayer must dispose of the ruling of the court on that offered by the plaintiffs. If, as we have shown, the defendant was not liable on the note at all, for want of authority in Gardner to make it, it is immaterial whether he disaffirmed this debt or not after his arrival at age. Besides, the prayer is fatal to itself in overlooking the evidence offered under the plea of limitations. According to the instruction, as prayed, the jury might have found for the plaintiffs, notwithstanding they might have been satisfied of the truth of the facts set up as a bar under the statute. The prayer is too general in not limiting the finding of the jury, upon the hypothesis there stated, to the plea of *non assumpsit*.

Judgment affirmed.

BENJAMIN F. REIGLE *vs.* ABRAHAM LEITER and others.

A judgment debtor executed two mortgages of different portions of his estate, and after his death, upon a creditors bill making all incumbrancers parties, the judgment creditors assented to a sale, reserving their liens, and under the decree a portion of the estate covered by the elder mortgage was sold, and the proceeds brought into court for distribution. HELD:

That this fund must be applied to the prior judgments, and the rights of such judgment creditors cannot be suspended until questions of contribution or of subrogation can be adjusted, nor can they be compelled to resort to other lands yet unsold for the benefit of junior mortgagees.

The elder mortgagee, upon the application of this fund arising from the property covered by his mortgage to the payment of elder judgments, will be *subrogated* to the rights of such judgment creditors.

APPEAL from the Equity Side of the Circuit Court for Washington county.

In this case a bill was filed, on the 6th of March 1850, by the *general* creditors of Joseph Hollman, deceased, for the sale of his real estate, consisting of lots and town property in

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Williamsport and a farm in the country, all of which was bound by judgments recovered in 1837, 1838 and 1840, upon which executions had been issued and levied on his real estate before his death. A part of the town property was mortgaged to Reigle and others, by a mortgage dated the 1st of April 1843, and the farm was subsequently, on the 2nd of September 1844, mortgaged to Benjamin F. Hollman.

The bill made all the judgment creditors, as well as the subsequent mortgagees, parties, in order to give a clear title to the purchaser, and at the same time guarding the rights of the mortgagees and judgment creditors, by allowing them all the priorities they had received and were entitled to out of the proceeds of sale. The answers of the judgment creditors assented to the decree upon the express condition, that all their respective liens and priorities should be preserved, and a decree was accordingly passed on the 3rd of December 1850, and a trustee appointed for the sale of the whole real estate of the deceased.

The trustee sold the town property mortgaged to Reigle, and the proceeds being brought into court, were distributed by the auditor to pay the judgment creditors according to their priority. To the ratification of the account so distributing the funds Reigle excepted, and filed a petition insisting that the proceeds should be distributed to him in payment of his mortgage, and that the trustee should be compelled to sell the land conveyed by the junior mortgage to Benjamin F. Hollman, upon which the judgments are also a lien, before the judgment creditors can be permitted to have the funds in court applied to their judgments; and that the land so mortgaged to Hollman is more than sufficient to pay these judgments; and that unless he is allowed his claim out of the fund in court, on which he has a specific lien, he will be deprived of his rights under his mortgage. The judgment creditors answered this petition, objecting to the proceeding, and insist that they have no evidence or knowledge of the sufficiency of the land mortgaged to Hollman to pay their claims, and ought not to be delayed.

The court (PERRY, J.) overruled the exceptions and ratified the account, and accompanying the order so doing delivered the following opinion:

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"The bill filed in this case makes parties of all those who have liens upon the real estate of Joseph Hollman, deceased, and a decree was passed for the sale of the land of which he died seized. The decree does not fix or determine the priority of payment, but requires the trustee to bring the money arising from sales into court, to be distributed by its order. From the facts in the case it appears, that Hollman, (the intestate,) executed, on the 1st of April 1843, a mortgage to Corbey, Cunningham, Baker and Reigle, conveying lots Nos. 44 and 45, in Williamsport, and on the 2nd of September 1844, he made a mortgage to Benjamin F. Hollman, by which he conveyed, with sundry articles of personal property, part of his real estate, being a tract called 'Delacarlia,' containing about three hundred and thirty-nine acres. That Jervis Spencer, (the trustee,) appointed by the decree to sell, has sold, among other parcels of land, the lots mortgaged to Corbey, Cunningham, Baker and Reigle, the proceeds of which sale is now in the hands of the trustee, and has been audited and is ready to be distributed. Under these circumstances it is contended, that as no part of the land mortgaged to Benjamin F. Hollman has been sold, and as the mortgage executed for the benefit of Reigle has not been satisfied, and the judgments due the Hagerstown and Williamsport Banks are older in point of time and a prior lien, should they be paid out of the proceeds of the lots, the security of Reigle will be gone, and the lien of the judgments which bound the land conveyed to Benjamin F. Hollman, would be extinguished or satisfied to the injury of Reigle. The property on which Reigle has a mortgage having been sold to pay the judgments which were a lien upon the land mortgaged to Benjamin F. Hollman as well as that of Reigle, and the mortgage to Reigle being older, he, Reigle, insists, that the trustee should sell first the land conveyed by the junior mortgage before they, the creditors, are to be permitted to have the fund now in court applied to pay off those judgments. I do not think it necessary to comment particularly upon the numerous authorities adduced in the argument of this case. The cases found in 1 *Johns. Ch. Rep.*, 413, 447; 3 *Do.*, 391; 5 *Do.*, 235; 17 *Ves.*, and 3 *Coke's Rep.*, 13, would have much

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weight and might control the determination of the cause, if it were not that the Court of Appeals of Maryland, (a tribunal of the highest legal authority, and whose decisions are always to be respected and esteemed of the most binding obligation,) has announced principles which I consider as peculiarly applicable to this case. The design of the petitioner is to obtain the action of the court, by which the judgment creditors are to be compelled to resort to other property than that which is embraced in their mortgage. That according to an equitable rule, when a creditor has a lien upon two funds, he may be compelled to resort to that which is not incumbered or secured to another; by which means the mortgage debt as well as the judgment creditor, it is contended, would be paid. In the case of *Gibson vs. McCormick*, 10 *G. & J.*, 65, where a bill was filed to sell the real estate of a deceased debtor to pay debts, the court determined that the question of contribution was one in which the complainants, (being a creditor of the deceased,) had no concern, and that a purchaser from one of the devisees under the will of the deceased debtor could not resist a decree for a sale, though such a state of things should have influence with the trustee in selecting such portions of the estate as may be necessary to sell, and that upon the principle of substitution, when the debts of creditors of the estate have been paid by a purchaser, or those claiming under him, from a devisee, he will be subrogated to the rights of the creditors whose debts he has paid.

"Also in the case of *Doub vs. Barnes*, 4 *Gill*, 1, the court say, they do not think that the plaintiff, who has obtained a judgment at law, should be compelled to suspend his execution until the question of contribution shall be settled as between the various defendants in the judgment, and if there be land not sold by the trustee, the defendants (judgment creditors) 'could not be driven to resort, for satisfaction, to such lands, as it was obvious that such a proceeding would greatly delay satisfaction of the judgments, involve them in litigation, without a certainty of making such lands to the full extent available as a fund to meet the judgments, and to compel them to resort to those lands, the court ought clearly to see that the re-

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sort to them would not be attended with difficulty, embarrassment or delay.'

"With these cases before me, I do not hesitate to determine, that the fund now in the hands of the trustee shall be applied to pay the judgments according to their priority, notwithstanding the fund thus applied is the proceeds of a sale of the property embraced in the mortgage intended to secure Reigle. To drive the judgment creditors to a sale of other land not affected by the petitioner's mortgage, would be such delay as the Court of Appeals has said a judgment creditor shall and ought not to be subjected to.

"If an application had been made to the court before a sale, and at such time as would have prevented delay, to have controlled the trustee as to such parts of the estate which he should sell, according to the case of *Gibson vs. McCormick*, 10 *G. & J.*, 107, this court, in the exercise of its discretion, may have directed a sale of that which was mortgaged to Hollman before the lots mortgaged to Reigle. Such is not the condition of this case, and no power exists to postpone the distribution of the money, in the absence of the assent of the judgment creditors. The property embraced in the mortgage to Reigle having been sold, and the proceeds having been applied to pay the judgment creditors, by which the lien of those judgments has been discharged, it might be thought that there exists no remedy for Reigle to be paid out of the lands of the deceased; that the judgment being a lien as well upon that which was mortgaged to them as that which was mortgaged to Benjamin F. Hollman, there is no mode or remedy by which they can be secured as against the junior mortgage. In this I do not agree. In the case of *Gibson vs. McCormick*, it will be seen that the court announced a doctrine in opposition to these views. That court allowed the principle of substitution to control in the distribution of the assets, and did not permit them to be ratably distributed between the creditors, without reference to the liens and priorities of the several claimants; and by the cases of *Tiernan vs. Rescaniere*, 10 *G. & J.*, 224; *Schnebly vs. Ragan*, 7 *G. & J.*, 121, the same equities which belong to the creditors whose debts are paid, are

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secured to the party who pays it, and who becomes subrogated to all the liens and rights which were attached to the claim. Under this view of the law, after the payment of the proceeds of the lots to the prior incumbrances, the mortgagees of those lots will be substituted and stand in equity, entitled to the same rights which such creditors had as against Benjamin Hollman, and of course the debt as secured by the mortgage being older and entitled, in every view, to a preference over Benjamin Hollman, must be paid before Hollman's mortgage, should the future sales bring enough for that purpose.

"The parties having answered the petition filed in the case, I do not entertain any difficulty in respect to the condition of the pleadings and proofs to authorise this determination; and, indeed, the case of *Gibson vs. McCormick* is an authority which furnishes a sufficient precedent for this course. It may not be amiss to suggest, that in the event of my entertaining a different opinion in regard to the principles to govern me in this case, I perhaps could not have gratified the prayer of the petitioner, as I cannot see any thing by which it can be determined that the unsold property is of value sufficient to pay the judgments. In the absence of such a fact, the interposition of a court for the purpose suggested by the petition could not be claimed. The testimony to show that the mortgage debt due Reigle has been paid I do not esteem sufficient; it by no means proves such to have been done, and, of course, with the opinion above announced, all the rights secured by the mortgage as to his debt must be considered as still existing.

"The exceptions to the audit will be overruled, and the audit ratified. I will not dismiss the petition, as other sales are to be made and the rights of the mortgagees to be adjusted. The amount for which the property may sell and the sum to be distributed may or not present such an aspect to the case as to modify the views of this court. And in the absence of an admission as to the value of the unsold property, whether there will be funds enough to involve the necessity of a controversy as between them is yet to be seen. I cannot but regard the passage of a decree now as between these parties as premature, and will not pass a decree as to them until all the facts per-

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taining to it shall be before the court, unless requested by the petitioner; when they are before the court a final decree will be passed."

From the order thus overruling his exceptions and ratifying the account, Reigle appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

Richard H. Alvey for the appellant, argued:

1st. That Reigle's mortgage being anterior in date to that to Hollman, an equity arises which subjects the land mortgaged to the latter to the payment of the judgments standing prior to the mortgage to the former, to the exoneration of the land mortgaged to him, or so much of the fund arising from the sale thereof as will discharge his debt. This precedency of time gives Reigle a clear advantage in right as against Hollman. 1 *Bibb.*, 523, *Clay vs. Smith.* 1 *Blackf.*, 91, *Gallion vs. M'Caslin.* At the date of Reigle's mortgage all the real estate of the mortgagor was equally bound by then existing judgments, which were general liens thereon, and if all except that mortgaged to Reigle had been applied to pay these judgments, upon no principle known could the mortgagor have claimed contribution from the land so mortgaged, but there would be a clear and strong equity to compel the mortgagor to exonerate and relieve such mortgaged estate from the payment of prior judgments. Nor will the mortgagor be permitted by any subsequent mortgage or transaction to increase the liability or incumbrance of the mortgaged estate to the prejudice of the mortgagee; for if such thing were permitted it would be in the power of every mortgagor, by collusion or design, to throw all the general charges and incumbrances upon his entire estate on a particular part of it, to the prejudice and injury of innocent third parties, who might purchase in good faith, and with every confidence that the general liens would be paid out of an abundant and ample estate remaining in the mortgagor at the time of taking his mortgage. There being then such strong equity as between the mortgagor and

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mortgagee, and the former being restrained from increasing the liability of the mortgaged estate to the prejudice of the rights of the latter, the subsequent mortgagee of the different remaining estate subject to general prior liens, (as between whom and the first mortgagee there is no right of contribution,) must sit in the seat of the mortgagor in respect of the first mortgage and take the land with all its equitable burdens, and he will not be permitted to take any advantage from his mortgage to the prejudice of the first mortgagee, or whereby the latter's right may be defeated. And in order to effectuate this equity as between the mortgagor or his subsequent mortgagee, of different parts of the estate and the first mortgagee of other lands, a court of equity will compel the prior judgment creditors, whose judgments are general liens upon the whole estate, to resort first to the land in possession of the debtor himself, and if there be none, or not enough to pay their liens, then to the lands last sold or mortgaged, and so on in the inverse order of sales or mortgages, and the first purchaser or mortgagee is only liable for the deficiency after all the lands held by the debtor, subject to such liens subsequent to the first mortgage or sale, have been properly applied. 3 *Coke*, 11, *(b,) Sir William Harbert's case. Lloyd & Goold*, 252, *Averall vs. Wade.* 4 *Kent's Com.*, 179, *note.* 1 *Johns. Ch. Rep.*, 447, *Gill vs. Lyon.* 5 *Do.*, 235, *Clowes vs. Dickenson.* 8 *Paige*, 277, *Patty vs. Pease.* 9 *Do.*, 173, *Schryver vs. Teller. Ibid.*, 648, *Rathbone vs. Clark.* 2 *Green's Ch. Rep.*, 125, *Britton vs. Updike.* 3 *Do.*, 224, *Wikoff vs. Davis.* 1 *Dev. Ch. Rep.*, 314, *Stanly vs. Stocks*, and *note* to page 317. 1 *Hill Ch. Rep.*, 500, *Stoney vs. Shultz.* 3 *Leigh*, 532, *Conrad vs. Harrison.* 10 *Do.*, 394, *McClung vs. Beirne.* 10 *Sergt. & Rawle*, 450, *Nailer vs. Stanley.* 2 *Watts*, 205, *Zeigler vs. Long.* 1 *Freem. Ch. Rep.*, 419, *Pallen vs. The Agricultural Bank.* 8 *Sm. & Mar.*, 357, *The Agricultural Bank vs. Pallen.* 6 *Ohio*, 227, *Piatt vs. St. Clair's Heirs, et al.* 11 *Do.*, 444, *Commercial Bank vs. Western Reserve Bank.* 14 *Do.*, 365, *Cary vs. Folsom.* 24 *Maine*, 427, *Holden vs. Pike.* 25 *Do.*, 383, *Cushing vs. Ayer.* 1 *Penn. State Rep.*, 267, *Cowden's Estate.* The same principle sustained by

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these authorities, and which, as shown by them, is the law in the several States of the Union, is also recognised by this court, in the case of *Watson vs. Bane*, 7 *Md. Rep.*, 117. The only authority which seems to be in conflict with them and to support the opposite doctrine, is that of *Doub vs. Barnes*, 4 *Gill*, 1, but it is submitted that the circumstances of that case are not *similar* to the present, and it is not *analogous*, and should not control the decision here.

2nd. This case as between Reigle and the prior judgment creditors involves the common principle of equity, that if a creditor has a lien on two different parcels of land, and another creditor has a lien of younger date on one of those parcels only, he will be entitled to have the prior creditor turned over upon the other fund to prevent a disappointment of the junior lien. Here Reigle being a subsequent mortgagee, and holding a specific lien only on the property mortgaged to him, he is entitled to have the prior judgment creditors, whose judgments are general liens upon all the debtor's real estate, turned over and be made to resort to that part of such real estate not included in or affected by his mortgage, to the extent or amount of his mortgage claim. 8 *Ves.*, 382, *Aldrich vs. Cooper*. 17 *Do.*, 514, *Ex-parte Kendall*. 1 *Johns. Ch. Rep.*, 409, *Cheesbrough vs. Millard*. 9 *Gill*, 185, *Woollen & Kurtz, vs. Hillen*.

3rd. Subrogation is not the proper or efficient remedy for Reigle in this case, for though the prior judgment creditors should receive the entire fund arising from the sale of the property mortgaged to Reigle, yet, because these judgments have been permitted to die and not revived by *sci. fas.*, and to all of them prior to the mortgage, limitations would be a bar, and because the levies thereunder have become wholly inoperative and void as against subsequent lien-holders, no assignment or cession that the creditors could make of their judgments would likely be effectual in securing to Reigle the payment of his mortgage debt. And it would be particularly unjust and inequitable, that parties who, by the use of ordinary diligence and expedition, could, many years since and before the death of Joseph Hollman, have made their judgments out of other

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lands than those mortgaged to Reigle, and upon which other lands levies had been actually made, should now be permitted to appropriate the only fund out of which Reigle can be paid to the payment of their judgments, irrespective of their proceedings thereon, and leave to Reigle the precarious chances and circuitous delays in pursuing their neglected and statute-barred judgments, as a forlorn means of realising his claim. The consequences of the *laches and neglect* of the prior creditors, in not executing their judgments and levies, should be visited upon them and not upon Reigle; and the fund arising from the sale of the estate mortgaged should be exonerated from the judgments of these prior creditors to the extent of Reigle's claim, who should be paid out of the fund originally designed for him. 1 *Johns. Ch. Rep.*, 409, *Cheesbrough vs. Millard.*

4th. If it be determined that the prior judgment creditors are to be paid at all events, notwithstanding their *laches and neglect*, and it should be thought that it is not sufficiently certain or evident to this court, that the other property than that mortgaged to Reigle will be sufficient to pay the balance due on the judgments prior in date to Reigle's mortgage, then this court will have to settle the principles in the case and remand it, under the act of 1832, ch. 302, to enable Reigle to prove the sufficiency of the remaining parts of the estate to pay such balance, which can be easily done.

J. Dixon Roman for the appellees, argued:

1st. That the judgments of the creditors are general liens and prior to either of the mortgages upon the property, and ought not to be delayed by controversies concerning contribution between the subsequent mortgagees. Whatever may be the law in other States this is unquestionably the law of Maryland. The decision in *Doub vs. Barnes*, 4 *Gill*, 1, is directly in point and must be conclusive of this case. See also 10 *G. & J.*, 65, *Gibson vs. McCormick*. 7 *G. & J.*, 121, *Schnebly vs. Ragan*.

2nd. There is no evidence in the record of the value of the farm mortgaged to Hollman, or of its sufficiency to satisfy the

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judgments, and for aught the record discloses the postponement, as prayed, may result in the loss of the claims of the judgment creditors. The mortgagee is liable to the charge of *laches* equally with the judgment creditors. But no harm is done or will result to any one from this delay, for neither the judgments nor the mortgage were barred by limitations at the date of the decree; and besides the claims are *admitted* by all parties, and no such defence can now be set up.

TUCK, J., delivered the opinion of this court.

We are of opinion that the order from which this appeal was taken should be affirmed, for the reasons and upon the authorities stated in the opinion of the court. According to the Maryland cases, there cannot be a reasonable doubt of the correctness of the decision. That of *Doub vs. Barnes*, 4 *Gill*, 1, is clearly in point. The cases are not precisely the same in the form in which the question is presented, but they are substantially alike, and the same principle must govern each.

The judgment creditors were brought into court, at the instance of other creditors of Hollman, in order that the sale of his property might not be prejudiced "by the doubts and uncertainties hanging over the title, by virtue of the judgments, *fi. fas.* and levies;" the bill also stating, that loss might be obviated by making all the incumbrancers parties, and having a sale made under the direction of a court of equity, at the same time guarding the rights of the mortgagees and judgment creditors, "by allowing them all the priorities they had received and were entitled to out of the proceeds of sale." To this mode of making the sale the judgment creditors assented, reserving their liens. The object then was, not to contest and ascertain whether the judgments were liens as against all or any of the parties, but to promote the advantage of all, by making a clear title to the purchasers. The change of the forum for the purpose of making the sale, cannot affect the rights of the parties *inter sese*. It certainly could not as against the judgment creditors as defendants, *in invitum*, nor upon the ground of their assent to the proceedings, because the assent expressly reserves their liens as acquired at law. Their rights

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cannot be suspended until questions of contribution or of subrogation can be adjusted; nor can they be driven to resort to other lands, yet unsold, for the benefit of junior mortgagees. 4 *Gill*, 22.

The objection that they have slept upon their rights to the prejudice of other creditors, does not apply to the judgment creditors any more than to the appellant. He was also an actor in this proceeding, and might at any time, as he may now, require the trustee to proceed to complete the trust. The judgment incumbrancers, reposing upon their liens on all the property, were not bound to have taken further steps, if the sales already made were sufficient to satisfy their claims. It was more properly the duty, as it was the interest, of the subsequent mortgagees, to have caused additional sales to be made for the payment of their demands.

We may remark, in answer to a suggestion in argument, that we do not perceive any obstacle, by lapse of time, in the way of these mortgagees, as the judgment creditors to whose rights they would be subrogated were not barred at the time of filing the bill, and such a defence could not now be interposed against the equities of those who may take their places, upon principles of substitution.

The case of *Watson vs. Bane & Winters*, 7 *Md. Rep.*, 117, is different from the present, and stands unaffected by the doctrines here announced.

Order affirmed, with costs, to be paid out of the fund.

JOHN A. WROE *vs.* THE STATE OF MARYLAND.

An indictment, charging that the traverser, "on the 1st day of October 1854," obstructed a public highway, "and did, on divers other days between that day and the time of taking this inquisition, continue and allow to remain the said" obstruction, "by reason whereof the citizens of this State, *during the time aforesaid*," could not pass over the road, sufficiently charges the *continuance and existence* of the nuisance at the date of the inquisition, and therefore justifies a judgment to *abate it*.

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Wroe *vs.* The State.

ERROR to the Circuit Court for Frederick county.

The plaintiff in error was indicted for obstructing a public road, in the words set out in the opinion of this court. The traverser pleaded *non cul.* and submitted his case to the court, (NELSON, J.,) who found him guilty, imposed a fine, and ordered him to abate the nuisance by removing the obstructions specified in the indictment. To correct this judgment, the traverser sued out the present writ of error.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

Wm. P. Maulsby for the plaintiff in error, argued, the indictment does not state the nuisance to be *continuing*, and that where such is the case, a judgment to abate it is not correct. 3 *Arch. Cr. Pl.*, 609, *note*. 8 *Term Rep.*, 142, *Rex vs. Stead.*

Bradley T. Johnson, State's Attorney for Frederick county, for the State, argued, that the indictment expressly and fully charges, that the nuisance was *continuing*, and that the judgment was therefore correct.

TUCK, J., delivered the opinion of this court.

This case comes up on a writ of error to the circuit court of Frederick county. The indictment charges the traverser, as follows: "that he, on the first day of October 1854, in a certain road, leading, &c., &c., being a common highway, &c., &c., unlawfully and injuriously did build and erect gates, and unlawfully and injuriously did cause to be built and erected gates and other obstructions, and did, then and there, and on divers other days and times, between that day and the time of taking this inquisition, unlawfully and injuriously continue and allow to remain, the said gates and divers other obstructions, so as aforesaid unlawfully built and erected, and caused to be built and erected, by reason whereof, the citizens of this State, *during the time aforesaid*, could not go, return, ride, pass and repass," &c., &c. The court fined the traverser and ordered him to abate the nuisance.

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The objection to the judgment is, that inasmuch as the instrument does not charge that the nuisance was in existence at the date of the inquisition, the court could not order it to be abated. But we think that this is sufficiently charged, for it is expressly stated, that by reason of the gates erected on the 1st of October, and on divers other days and times, between that day and the finding of the inquisition, the citizens of the State, *during the time aforesaid*, (that is, from the 1st October to the time of the indictment,) could not go, return, pass, &c.

The object of all pleadings is notice to the party, and this averment sufficiently indicated the offence charged against the plaintiff in error. In the case of *Rex vs. Stead*, 8 *Term Rep.*, 142, the nuisance was not laid with a *continuando* as here. The objection was not that the court had directed the nuisance to be removed, but the prosecutor complained that the judgment was erroneous in not having so directed, and the court held, that it was not necessary to do this where it was not charged as existing at the time of the inquisition.

Judgment affirmed.

Jas. Malcolm, Perm't Trustee of Thos. Sprigg and Henry Meseke, *vs.* Jas. Hodges.

The validity of a deed of trust for the benefit of creditors must be determined by the *deed itself*, without reference to extrinsic facts.

A deed from two parties, "copartners in trade," conveying "all and singular the stock of goods, machinery, book-accounts owing to" the grantors, "of whatsoever consisting," to hold the same *in trust*, to sell and apply the proceeds in part to such creditors as shall release the grantors "from all their liabilities, *individual as well as copartnership*," operates as a conveyance of all the grantor's property, both *joint and separate*.

An *implied* reservation of the surplus, after paying the releasing or preferred creditors, to the grantor, avoids the deed equally with an *express* reservation, and the court cannot look outside of the deed to ascertain whether there will be a surplus or not.

Such an assignment, to be valid, must convey all the property of the debtor,

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and *in terms* dedicate the whole for the benefit of his creditors, subject to such preferences as may be declared in the deed.

A deed which makes no disposition of the surplus, after paying the releasing creditors, is *void*, because there is an implied reservation of such surplus to the grantor.

APPEAL from the Court of Chancery.

The bill in this case was filed on the 15th of July 1850, by the appellant, as permanent trustee in insolvency of Sprigg & Meseke, to vacate a deed executed by the said insolvents to the appellee, on the 2nd of June 1849. The bill assails the deed as void both at common law, under the statute of *Elizabeth*, and under the insolvent laws. Sprigg & Meseke applied for the benefit of the insolvent laws on the 5th of July 1849, and the appellant was duly appointed their permanent trustee on the 11th of August following.

The deed, which is filed as an exhibit with the bill, is dated the 2nd of June 1849, and purports to be an "indenture between Thomas Sprigg and Henry Meseke, copartners, trading in the name, style and firm of Sprigg & Meseke," and James Hodges. It recites, that "whereas, the said Sprigg & Meseke are indebted to sundry persons, and being unable to pay their liabilities, the said Sprigg & Meseke have hereby assigned all their estate and effects unto the said Hodges, upon trust, for the benefit of their creditors, to be distributed, *pro rata*, according to their claims, among them, or so many of them as will sign a release, on or before the 2nd of July next succeeding the date above written to the said Sprigg & Meseke, to them." It then, in consideration of the premises, conveys to Hodges "all and singular the stock of goods, machinery, book-accounts owing to said Sprigg & Meseke, and all and singular the estate and effects of the said Sprigg & Meseke, of whatsoever consisting: To have and to hold the said property, estate and effects of the said Sprigg & Meseke unto the said James Hodges, his executors, administrators and assigns," *in trust*, to sell the same at public auction or private sale, as the trustee in his discretion may deem best, and collect and apply the proceeds to pay, *first*, the expenses of the sale and the trust; *secondly*, the trustee's commission of eight *per cent.*, and *thirdly*, to distribute

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the residue "*pro rata*, according to their claims, among those of the said Sprigg & Meseke's creditors who shall, on or before the 2nd of July next succeeding the date first above hereinbefore written, sign a release to the said Thomas Sprigg and to the said Henry Meseke, from all their liabilities, individual as well as copartnership, to them the said creditors." It also contains a power of attorney to Hodges to collect the debts due the grantors and to compound for the same.

The answer of Hodges states, that shortly before the 2nd of June 1849, Sprigg & Meseke called a meeting of their creditors, for the purpose of laying before them a statement of their assets and liabilities, and getting an extension upon their liabilities, averring at the time that they were able and would pay all their debts if time was given them; that at this meeting respondent, being a creditor, met with a large majority of the creditors, who then examined into the affairs of Sprigg & Meseke, and unanimously determined, it would be for the interest and advantage of all and each of the creditors of said parties that they should at once execute an assignment of all their effects for the benefit of their creditors, which they agreed to do, and accordingly executed the deed in question; that at this meeting, all the creditors present believed Sprigg & Meseke ought to be released upon the execution of said deed, and agreed themselves so to release them; that after the execution of this deed, respondent addressed letters to all the non-resident creditors, informing them of its provisions, and all of them, except two, whose claims do not amount to one-fourth of the grantors' liabilities, have agreed to come in under it. The answer also denies that the deed is void under the insolvent laws.

A replication was filed and the cause submitted to the chancellor (JOHNSON) upon bill, answer and replication, who delivered the following opinion, accompanying his decree dismissing the bill:

"This cause was submitted on the part of the complainant during the sittings of the term, and at the close of the sittings is laid before the chancellor under the rule for decision.

"After the repeated adjudications of the Court of Appeals upon the subject of the validity or invalidity of deeds contain-

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ing provisions similar to those to be found in this deed, I deem it unnecessary to occupy time or space in an argument, and will merely say, that according to my understanding of the case of *Sangston vs. Gaither*, 3 *Md. Rep.*, 40, the deed in this case is valid.

"It does convey all the estate and property of the grantors of every kind and description, and there is no reservation of the surplus to them after paying the preferred, or any class of creditors. The deed, therefore, is not void at common law or under the statute of *Elizabeth*, and there being no evidence in support of the allegations of the bill which assail it as void under the insolvent laws, the complainant does not make out a title to relief in any way, and his bill must be dismissed."

From the decree dismissing his bill the complainant appealed.

The cause was argued before LeGrand, C. J., Tuck and Mason, J.

William H. Norris and *J. M. Campbell* for the appellant, argued, that the deed in question was void:

1st. Because while under it nothing passes to the trustee for the use of the releasing creditors except the partnership property of the grantors, it demands from the releasing creditors a release to the grantors of all their liabilities to such creditors, individual as well as partnership. That such a deed is void has been expressly adjudicated, and this although the debtors had no separate property. 5 *Rawle*, 221, *Thomas vs. Jenks.* 6 *Watts & Sergt.*, 300, *Hennessy vs. The Western Bank.* 3 *Md. Rep.*, 12, *Green & Trammell, vs. Trieber.* It seems to be too plain for argument, that when two recite a joint interest and joint liabilities, and a style or firm, and only mention the estate and effects of such style or firm as intended to be granted, that it would be impossible to suppose that any thing was intended to be covered by the grant but what belonged to the style or firm ownership: otherwise every deed by partners would be held to convey all the joint and separate estate of the partners, if the style of the partnership chanced to correspond with the surnames of the individual partners. But when you pass from the granting part of the deed to the *habendum*,

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it will be seen that the rule of construction coincides with the knowledge of the grantors and violates no possible intention in fact; for in stipulating for releases it is from all their liabilities, "*individual* as well as *co-partnership*," thus recognising their appreciation of the distinction between their private and co-partnership relations as respects debts, and if this was before their minds, the failure to convey also *thus distinctly and distributively* evinces a clear purpose to reserve from the grant their individual estate. The next question is, assuming the deed does not convey the individual property, is it good until the parties assailing it prove that there is individual estate which has not been conveyed? If such is the duty of the party assailing the deed, then a deed from a partnership conveying a single chattel is *prima facie* good until the parties assailing it prove there were other chattels or assets. And can such a principle be law in cases where, for the *permission* given to exact releases, the party is required to make it appear that he has conveyed *all his estate?* Must not the operative transfer in law be in fact of all the party's property, stated or unstated, known or unknown? Can a law levelled against fraudulent reservation be otherwise administered? Must not the grantor *show* conclusively that he has complied with the condition? It therefore seems to us that it ought not to be admissible for a grantor to prove that the specification includes all his property, where the terms of the grant do not in themselves convey all. The rule being directed against fraudulent reservations, they are allowed too much liberty of accomplishment when a party is permitted to narrow the terms of his grant from a general transfer into a particular one, and then to prove that practically it is a general transfer. The simplicity of fair dealing requires that the proof of compliance with the rule *should be found in the terms of the grant.* This is sufficiently indicated in the cases of *Green & Trammell, vs. Trieber*, 3 *Md. Rep.*, 12, and *Sangston vs. Gaither, Ibid.*, 41, independently of the other authorities.

2nd. Because the deed makes no provision for paying any surplus remaining after the claims of the releasing creditors shall have been satisfied over to those creditors who may refuse

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to sign a release, and therefore any surplus that might remain in the hands of the trustee would revert to the grantors themselves. 3 *Md. Rep.*, 41, *Sangston vs. Gaither.* 17 *Verm.*, 390, *Dana vs. Lull.* 7 *Md. Rep.*, 380, *American Exchange Bank vs. Inloes, Garn. of Turnbull & Co.* The effort to sustain this deed as a *composition deed* is met with many insuperable difficulties, which need not be noticed; for whether there be a valid composition or not as to certain creditors, it is admitted there were *two* who did *not* compound, and whether there were or not any thus dissenting, it is not perceived how that makes a deed good which makes no provision for paying any surplus, after the claims of the releasing creditors have been satisfied, to those who may refuse to sign a release. This court is not sitting over the distribution of assets; equity don't distribute insolvent estates. 3 *Md. Rep.*, 464, *Manahan & Gorman, vs. Sammon & Thurston.* If the failure to make this provision makes the deed void, the composition and release is a matter between the insolvent trustees and the trustees, and the grantor and the composition creditors, which only comes up when a distribution is gone into. If the deed is valid as *between the parties* the insolvent trustee will pay the surplus to the grantors, but he has none the less right to set the deed aside. That nobody will be injured by its being treated as valid, is a question with which a court of equity has no concern; that only arises when creditors are notified to file their claims and a distribution is to be made. It cannot be legally known until then whether there are *dissenting* creditors or not.

St. George W. Teackle for the appellee, argued:

1st. That the *first* objection to the validity of the deed is not supported by any evidence in the cause, or by the provision of the deed itself, but on the contrary, the deed itself conveys not only all the *partnership property* of the grantors, but also *all their individual property;* for, after granting to the trustee "all and singular the stock of goods, machinery, book-accounts owing to said Sprigg & Meseke," the deed further says, "*and all and singular the estate and effects of the said Sprigg & Meseke, of whatsoever consisting.*" Now upon the well estab-

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lished rule of interpretation in regard to deeds, that every deed is to be construed as strongly against the grantor as possible, can it be doubted that the individual estate and property of the grantors in this deed passed to the trustee under its provisions? Such was the construction put upon the deed by the learned chancellor who decided this case below. But even if no individual property did pass by the deed, can it be successfully contended for *as law in Maryland* that this deed is void on that account, without some evidence to show that the grantors had some individual property? Is the court to presume that they had individual property, for the purpose of establishing upon that presumption of fact (not sustained by any allegation or proof in the cause) the legal conclusion, that the deed is thereby avoided, and that too upon the ground of fraud? Such a doctrine, it is respectfully submitted, will not, upon a careful examination, be found to be supported by either of the cases referred to by the counsel on the other side. No such point was presented for the decision of the court by the record in either of those cases.

2nd. The *second* objection to the deed is equally untenable and unsupported by authority. The deed reserves no surplus to the grantors or any one else, and the objection rests upon the ground of a surplus by way of resulting trust to the grantors. This point is liable to the same objection as to the *first*, *viz.*, that there is no fact in the case to show, or from which it could be rationally presumed, that any of the creditors would refuse to take under the provisions of the deed of trust, or if any would have so refused, whether their dividends would have been more than sufficient to pay in full all the claims of the assenting creditors, and leave a surplus for the grantors. And yet to support this *point* the court *must presume* both these facts, and that too in opposition to the fact stated in the answer responsive to the bill, and not excepted to by the complainant, that all of the creditors at the meeting called to investigate the affairs of the grantors, they being a large majority in value of all the creditors, advised and accepted the deed, and agreed to abide by its provisions. We submit, that the cases of *Sangston vs. Gaither*, and *Dana vs. Lull*, decide no

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such doctrine. But we say the present case stands upon grounds totally different and clearly distinguishable from those on which any of the cases cited on the other side were decided. None of them decide or intimate that if the creditors *agree* with their debtors to take less than the full amount of their claims and release them, that such an agreement, if based on a valuable consideration, would not be valid and binding against such creditors, nor can any case be found going to that extent. Upon such an hypothesis as this there could be no such thing as valid *deeds of composition* between creditors and debtors, and yet the books are full of them, and the principles governing them are so familiar as not to require the citation of authority. Now apply these principles to the present case, and it will be found that the deed in question is a deed of *composition* between creditors and debtors, and not a deed having in it or about it a single feature obnoxious to any of the provisions of the *statute of Elizabeth*. (The learned counsel then further argued, that from the facts of the case, as disclosed by the *answer*, this was a *composition deed*.)

TUCK, J., delivered the opinion of this court.

The appellant, as trustee of Sprigg & Meseke, under the insolvent laws, filed a bill against the appellee to vacate a deed from Sprigg & Meseke to him, as trustee, for the benefit of their creditors, on the terms and conditions mentioned in the deed. The case was heard on bill, answer and replication, before the chancellor, who dismissed the bill, being of opinion, that as the conveyance transferred all the property of the grantors, and contained no reservation to them of any surplus, after paying the preferred or any class of creditors, it was not void.

The validity of the deed must be determined without regard to the surrounding and other circumstances averred in the answer. If admissible for any purpose they are not proved. "We are to look to the character with which the law stamps the deed, without reference to extrinsic facts as to motive. If the law imputes to the grantor a design in making the deed, no evidence of intention can change the presumption. If the

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law declares the deed to be void, it is no matter how the question of fraud in fact may stand." 3 *Md. Rep.*, 40, *Green vs. Trieber*.

Upon consideration of the deed we are of opinion, with the chancellor, that if good in other respects it would operate as a conveyance of all the grantors' property, joint and separate. The terms are not very clear; but, construing all its parts together, the legal effect of the granting clause and the *habendum* is to vest in the grantee title to all their property and effects of every description. But we think the instrument is void as against the appellant, representing the creditors of the grantors, because the necessary effect of the trusts declared therein is to secure to the grantors any surplus that may remain, after paying the claims of those creditors who may come in under its terms within the time limited. The law is now too well settled to admit of dispute, that deeds of this description must not only convey all the property of the debtor, but they must, in terms, dedicate the whole for the benefit of the creditors, subject to such preferences as may be declared in the deed. There must be no reservation to the debtor, express or implied. We cannot look outside the assignment to ascertain whether there will be a surplus or not. That would make the efficacy of the instrument depend on extrinsic circumstances, when the law requires that its intent shall be gathered from its face. This deed, in express terms, restricts the benefits designed to be conferred to those creditors who may come in within a certain time and execute releases. Nothing is said of the surplus. Now suppose creditors, to a very small amount, assent, and that all the rest stand out, what becomes of the surplus of the property when those few who may assent are fully paid? Does it not belong to the grantors as a resulting trust? Nothing, in our opinion, can be clearer. The refusing creditors could not claim it under the deed, and it would not belong to the grantee, as in cases of deeds where the grantee is not a trustee for others. It is true the other creditors might prosecute their claims against the trustee, in respect of this surplus, but not in reliance upon the assignment, which they have repudiated. They would claim to be paid out of the fund, not as

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theirs by the deed, but as the property of the grantors, their debtors, in the hands of the trustee for the use of the grantors; and this pretension, probably, could be asserted only by process of law, to which, as we have said in 3 *Md. Rep.*, 52, the grantors have no right to compel them to resort.

The view here expressed was affirmed in *Dana vs. Lull*, 17 *Vermont*, 390, referred to in 3 *Md. Rep.*, 51. The case then before the court did not require us, in terms, to go as far as the Vermont doctrine, but we have no doubt of its correctness, upon principle, and so intimated. If such deeds, as the one before us, are valid, fraudulent transfers might easily be made by granting preferences to a few creditors, of small amount, and omitting all mention of the surplus. The operation would be, that after the property was sold and the preferences satisfied, the trustee would return the residue to the debtor before the other creditors could take measures to arrest it in his hands for the payment of their claims. To prevent such devices the law requires that the deed, on its face, shall show that the debtor can get nothing for himself, so long as a creditor remains unpaid.

This case is substantially the same as *Dana vs. Lull*, and satisfied that it was decided on proper grounds, we adopt the reasoning there employed as conclusive of the question arising on the assignment now in controversy.

Decree reversed, and cause transmitted to the circuit court of Baltimore city.

Samuel B. Anderson and others, *vs.* Mary E. Tydings and others.

A debtor may prefer one creditor to another, provided the instrument designed to effect the object contains the requisite provisions.

But if, through a *mistake in law*, the parties select and use such an instrument as cannot effect their object without the aid of a court of equity, the court will not correct the mistake by reforming the instrument, to the prejudice of the general creditors of a debtor in very embarrassed circumstances.

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Where creditors, by reason of a *mistake in law*, in drawing a deed, have a legal advantage, a court of equity will not deprive them of it, by restifying the deed for the benefit of parties whose claim rests upon *no stronger* equity than theirs.

A disclaimer of title to land made by a party *after* judgments have been recovered against him, cannot destroy the *liens* of such judgments upon the legal rights which he had in the land at the time the judgments were recovered.

The act of 1841, ch. 161, prohibits the sale of the husband's tenancy by the curtesy, during the life of the wife, but still leaves in the husband the same life estate which he would have had prior to the passage of that law.

Though an injunction stays an execution, yet the lien of the judgment is not lost or suspended, even during the continuance of the injunction.

A judgment with stay of execution till the happening of a contingency, or until a future specified time, is still a lien upon the estate of the defendant during the stay.

APPEAL from the Equity side of the Circuit Court for Anne Arundel county.

The bill in this case was filed by the appellees, the children and heirs at law of Mary Ann Tydings, for an injunction to restrain execution levied by the appellants, who were judgment creditors of Roger Tydings, the husband of said Mary Ann Tydings, deceased, upon the interest of said Roger Tydings, as tenant by the curtesy, in certain land conveyed to his wife in fee by Thomas R. Beard and wife, by deed dated the 8th of January 1848, and to correct an alleged mistake in said deed. The facts of the case will be found sufficiently stated in the opinion of this court, and in the case of *Anderson et al., vs. Tydings et al.*, 3 *Md. Ch. Dec.*, 167, as well as in the following opinion of the court below, (BREWER, J.,) accompanying the decree appealed from in this case.

"This cause, having been argued on both sides, has been submitted on final hearing and duly considered. The present defendants filed a bill in the chancery court against Roger Tydings and his wife, then living, to set aside a deed from Thomas R. Beard and wife to Mary Ann Tydings, wife of said Roger, on the ground of fraud. The deed was dated January 8th, 1848. The bill was filed March 27th, 1851. Answers were put in, and the wife dying subsequently, the present

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complainants were made parties, and, on the 1st of October 1852, the chancellor passed a decree refusing to set aside the deed and refusing to give the complainants, who were judgment creditors, any relief, on the ground, 'that the complainants could reach Roger Tyding's interest as tenant by the curtesy, by an execution at law upon their judgments, if he should be entitled to such interest.'

"The complainants then issued an execution upon their judgments and laid it upon the said tenancy by the curtesy; whereupon the present complainants, heirs of Mrs. Tydings, filed their bill for an injunction, and praying that the land, that is, Tyding's interest, might be conveyed by him to them, on the ground that a mistake had been committed in the deed or instrument of writing conveying the property to Mrs. Tydings in fee, leaving it subject to the curtesy of her husband, when it was intended to secure it to her for the benefit of herself and children beyond the reach of her husband's creditors.

"The special allegations of the bill having reference to this mistake are: 'That your orators' father gave the direction for drawing said deed to your orators' mother *without knowing that any particular form was necessary;* and that said Susan Elliott, (the grandmother of complainants, with whose money the property was bought,) never interfered in any manner, being herself *unacquainted with law, and supposing that every thing had been done to carry out, in a complete manner, the object in view,* which was to protect the said property from the debts of the said Roger Tydings after she had paid a full price for it.'

"In support of these allegations it is proved, by Roger Tydings, that the property was paid for by Mrs. Elliott, his wife's mother, who refused to take the deed to herself, and in reply to her daughter's proposition to do so, stated, that she would prefer *that her daughter should take the conveyance to herself, for her own and her children's benefit;* that he stated to the scrivener who drew the deed, that it was purchased with his wife's means, and that he wished him to draw the deed to his wife, and that not knowing what form to direct concerning the conveyance he gave no particular directions as

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to form. This witness further stated in answer to the cross-interrogatories of the defendants, that he was authorised by his wife and Mrs. Elliott to have the deed drawn; that he supposed the deed conveyed to his wife such an estate as he was directed to have conveyed; that he supposed it did convey to his wife a separate and sole interest, and so supposing felt satisfied that he knew what was in the deed, and thought it all right.

"This testimony is confirmed by the testimony of the scrivener and of Mrs. Elliott, who proved particularly, that she had no intention *to give any interest to Tydings in the land, or subject it to the payment of his debts*, and that if she had apprehended anything of the kind she would have taken the deed to herself.

"I cannot perceive what interest Tydings has in reforming this deed, which would render him an incompetent witness, and even if he had such an interest the case is proved without his testimony. Cases were cited to show that parol testimony cannot be taken to control or vary this deed, but the same cases show that it may be taken to correct a mistake in the draft. The fact then of the mistake, on the ground of which the relief is sought, is, that the vendor and vendee both intended that the property should be conveyed to Mrs. Tydings for the benefit of *herself and children*, so as to exclude any resort of Tydings' creditors to it for the payment of his debts, but being ignorant of what form of conveyance was necessary to effect that object, they gave no *special* direction to the scrivener, and he drew the deed in question, which they thought right, and which did, in fact, by the act of 1841, ch. 161, secure the property from the claims of his creditors during the life of his wife without her consent, but did not prevent her from disposing of it away from the children, and though it is not altogether clear that it was intended to deprive Mrs. Tydings of any right of disposition or to leave it to her to take care of the children, but left it subject to her husband's tenancy by the curtesy, and liable to that extent to be sold by his creditors after her death.

"The question on this case then is, whether this mistake

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can now be rectified at the instance of the complainants, at the expense of the creditors of said Roger Tydings, who were such before the execution of the deed. Mrs. Elliott is not the complainant, but the intended *cestui que trusts*, who, by the death of their mother, have all they could have taken as her heirs, and the prayer is to have their father's curtesy conveyed to them and the defendants' creditors enjoined.

"I can find no case precisely like the present. The case of *Hunt vs. Rousmaniere*, 1 *Pet.*, 1, which contains the whole doctrine on the subject, is not exactly similar, but lays down principles upon which I think this case may be decided. The general intention of the parties in that case was to obtain and give a security equivalent to a mortgage, and counsel was consulted on the point, upon whose advice a power of attorney was agreed upon and taken as fully competent to carry their views into effect; but the parties and their counsel made a mistake as to the law, the instrument taken not being competent for that purpose. The court in their opinion say: 'But the plaintiff was not satisfied to leave the kind of security which he was willing to receive undetermined. He thought it safest therefore to designate the instrument, and having deliberately done so it met the views of both parties, and was as completely *incorporated into their agreement* as were the notes of hand for the sum intended to be secured.' And they further say: 'The question is, ought the court to grant the relief which is asked for, on the ground of any mistake arising from any ignorance of the law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake, and refuse to grant the relief sought.' But the court, in the antecedent part of their opinion, had said: 'There are certain principles of equity applicable to this question, which, as general principles, we hold to be incontestible. The first is, that when an instrument is drawn and executed which professes, or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by *mistake of the draftsman*, either as to fact or law, does not fulfil, or which violates the manifest intention of the parties to the agreement, equity

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will correct the mistake so as to produce a conformity of the instrument to the agreement.' And again: 'That the general intention of the parties was to provide a security as effective as a mortgage of the vessel would be, can admit of no doubt, and if such had been their agreement the insufficiency of the instruments to effect that object, which were afterwards prepared would have furnished a ground for the interposition of a court of equity which the representatives of Rousmaniere could not easily have resisted.'

"The facts of this case bring it clearly within the scope of these principles. The parties to the agreement of purchase and sale certainly intended that the land should be conveyed to Mrs. Tydings; that it should not be made liable for the debts of Roger Tydings, and it might be inferred also, from the testimony, that the intention further was, that it should be secured from any alienation or incumbrance of Mrs. Tydings to the prejudice of her children, but the latter intention is immaterial, as she died without any such attempt, and her children now inherit as her heirs. Upon the general intention, as to the exemption from Roger Tydings' debts, the purchaser and the grantee relied. They made no mistake as to the nature of the instrument to be taken; no agreement with regard to it; but in their utter ignorance of what kind of instrument was required, or rather of what provisions in the instrument were necessary to effect that object, merely stating their general intentions somewhat imperfectly, they left it to the scrivener, who, mistaking the law from his slender information in such matters and from the imperfect directions of the agent, drew a common deed of bargain and sale to the wife. The mistake, therefore, was the mistake of the draftsman as to the legal effect of the instrument, or the intentions of the parties; a mistake either in fact or in law, which brings it clearly within the principles laid down in the above case of *Hunt vs. Rousmaniere*, and entitles the parties to the relief prayed against Roger Tydings. I see nothing else in the case to prevent the court from granting the prayer of the bill. The creditors, defendants, were not injured by the omission to disclose the mistake sooner, as they were creditors at the time of the sale

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by Tydings and execution of the deed, and therefore did not credit him on the faith of his possible interest in this land, and if they had it would have made no difference, as Mrs. Elliott was a purchaser of the land for valuable consideration. The court will sign a decree for a conveyance of the legal interest of Roger Tydings under the deed to his children, and granting a perpetual injunction against the other defendants."

From the decree passed in conformity with this opinion the defendants appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and TUCK, J.

Henry M. Murray and *Frank H. Stockett* for the appellants, argued:

1st. That the grantee will be supposed to be conversant with every thing mentioned in the deed, and that if there be any mistake it is one of law and not of fact, which equity will not correct. 2 *H. & G.*, 415, *Hudson vs. Warner & Vance.* 12 *G. & J.*, 49, *Hall vs. Creswell.*

2nd. There is no mistake. The deed is just such an one as the scrivener was directed to frame, as appears by the testimony in the case.

3rd. Parol evidence is not admissible to vary, add to or contradict, a deed or written instrument, except to show fraud. Particularly, equity will not interpose after rights and liabilities have accrued upon the faith of the property. 6 *H. & J.*, 24, *Wesley vs. Thomas. Ibid.*, 435, *Watkins vs. Stockett. Roberts on Frauds*, 79, 81.

4th. Parol evidence is not to be admitted or extraneous circumstances introduced in the exposition of deeds, except in the single instance of latent ambiguity. 4 *H. & J.*, 278, *Howard vs. Rogers.* 5 *Do.*, 245, *Hammond vs. Ridgely.* 6 *Do.*, 24, *Wesley vs. Thomas.*

5th. That Roger Tydings having bought and paid for the land, was in possession of the equitable, though not the legal title, which was or is assignable only in writing under the statute of frauds and perjuries.

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6th. Equity will not correct a mistake in law. 1 *Story's Eq.*, *secs.* 111 to 120.

7th. The equities of the appellants and appellees are at least equal, and where equity is equal the law shall prevail. 1 *Pet.*, 1, *Hunt vs. Rousmaniere.*

Cornelius McLean for the appellees, after stating the facts of the case, argued:—1st. That Tydings had no such seizin as will enable the judgment creditors to sell any part of the property; and 2nd, that if he had it was only subject to the use for his wife, which this court will declare, and so modify the deed as perpetually to establish.

1st. It will appear from an examination of Roger Tydings' answer, in the case of Anderson and others against him and others, in chancery, that he disclaimed any interest whatever in the property in question. If that had been a disclaimer at law, there would have been no seizen in the husband during marriage, and Tydings would, of course, have no right now in the property which could be affected by the executions sought to be enforced against it. But it is said, that at law a man cannot disclaim except as to that in which he has a perpetuity, and not where his right is merely as husband. 2 *D'Anver's Abr.*, 569. But a man may disclaim any right or title in equity, and an equitable disclaimer makes him, so far as the legal estate which may be in him is concerned, a mere trustee for the person rightfully entitled. Now as Tydings disclaimed all interest in this property during the life of his wife, could he have enforced his right as tenant by the curtesy against her heirs at law? At law he might have done it perhaps, but would he not have been enjoined in equity from enforcing that to which he had said in equity he had no title? For unless there is a tenant by the curtesy initiate, there can be no tenant by the curtesy after the death of the wife; and to make a tenant by the curtesy initiate, there must be a seizen of the husband in right of the wife, or rather the wife must have a seizen in fact; for a seizen in law will not answer for the curtesy. Now after his disclaimer during the life of his wife, what interest had he? Suppose he had by deed admitted, that the

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conveyance was so worded by mistake; that it never was intended that he should have any interest in it, and that he claimed none. Would not that have been available against every body in favor of the heirs at law, unless it was attacked on the score of fraud? The answer of Tydings is equal to the most formal deed. It was filed under oath in a case in which the defendants, the execution creditors, were plaintiffs, and the whole circumstances of the case, the source from which the money came, the discussion about the person to whom the deed should be made, the testimony of Tydings as to his instructions to the conveyancer, all corroborate Tydings' answer, and show conclusively, that instead of there being any fraud in his disclaimer, and in Mrs. Tydings having an estate for her separate use, it would be a fraud upon the mother-in-law to apply the property intended for her daughter and grandchildren to the payment of the debts of the very man from whom she purchased it for that daughter and those grandchildren. The equity of the wife and of her mother-in-law is established by the proof, so as to fully support the answer of Tydings, and show that when he said he had no interest he really had none. Now if there was nothing fraudulent in that answer, and all the circumstances of the case show that there was no fraud, how can the creditors get over it? They stand in the place of Tydings; and if Tydings had no interest, how can they have any? Tydings has in writing declared he had no interest. That declaration has been sustained by the whole of the *res gestæ*, so as to make it evident to the court that he spoke upon well ascertained facts. There being no fraud, therefore, and he being now a disinterested witness, upon what principle of equitable jurisdiction can we fail to sustain the injunction already obtained in this case?

2nd. I now pass to the second point, under which I contend, that if we are wrong in the first, we can fully sustain our right to the interposition of this court. It is true that courts of equity are generally reluctant to interfere with deeds even on the score of a gross mistake, where the testimony on which their action is intended to be founded, is entirely oral. I relieve this case at once from that difficulty by bringing forward Tydings' an-

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swer, in which the party interested admitted the substantial matter now claimed; and also by bringing forward his testimony in this case, wherein he has no other interest than a bias in favor of his children: which is of course to be allowed for. He is, nevertheless, the person under whom the defendants claim, and he certainly can himself gain nothing by their success or failure. His children are the only persons on the one hand, and his creditors are the only persons on the other; so far as he has any *interest*, it is clearly against his children and in favor of his creditors. It is to be recollected, that there was no counsel employed in this case when the transfers were being made; that the deed was drawn by an unskilled person; and that according to the testimony of Mr. Tydings, he was instructed to draw it for the benefit of his wife, Tydings telling him he had no interest whatever in the property. Now what, but a mistake on the part of the conveyancer, could have induced him to draw a deed like the one in this case, if Tydings was to have no interest? The deed did give him at once an interest as husband. It gave him a life estate, and it makes no difference that Tydings saw the deed. He was not an expert in law but a plain mechanic. It was in fact no mistake of law in him, because he supposed that the conveyance had carried out his instructions which he brought from his mother-in-law, who had consulted with his wife. Besides, the consultation between his mother-in-law and his wife, as to who should take the deed, the intention being to provide for the wife, clearly shows what their understanding was of the character of the title to be taken, and that Tydings was to have no interest. It has been said by Lord Hardwicke, "that if a contract is reduced to writing contrary to the intent of the parties, on proper proof it would be modified." 1 *Story's Eq.*, *sec.* 153. Again, to allow a mistake or omission to avail, would be to work a fraud or surprise on the parties, and as much injustice would be thus done as by a positive fraud. *Ibid.*, *sec.* 155. It is on this account that parol testimony will be allowed to show the mistake, which has always been considered an exception to the rule, that such testimony will not be allowed to vary written agreements. *Ibid.*, *sec.* 156. This

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relief, although not granted in doubtful cases, will be granted where there are no strong presumptions to the contrary of the proof; and it will be granted as well where the contract is executed as where it remains executory. In such cases it reforms the preliminary contract, and the formal and solemn deed founded on it. *Ibid.*, *sec.* 159. It had been doubted, and in England the courts have decided not to grant a specific performance where they have reformed the contract, but in this country the contrary has been determined by Chancellor Kent. *Ibid.*, *sec.* 161. It is a mistake to suppose that the testimony must come up fully to a mistake, for if the court can make out from the nature of the transaction, as disclosed by the testimony, that there *must have been a mistake*, relief will be granted. *Ibid.*, *sec.* 162. And this relief will be given in favor of privies against *judgment creditors*, but not against purchasers for a valuable consideration without notice. *Ibid.*, *sec.* 165. So equity will grant relief so as to effect the real intentions of the parties, although the instrument may be drawn up in a very inartificial manner, if the real object can be gathered from the instrument or the *circumstances* of the case. *Ibid.*, *sec.* 168. That the mistake in this case is not a mistake of the law, or at least such a mistake of law as the court cannot relieve from, is evident from the fact, that it has relieved against the effect of marriage upon bonds given before marriage, which were of course made void by the marriage. *Ibid.*, *sec.* 136. So where parties did not understand the nature and effect of their own acts, which looks something like a mistake in law, the court has relieved. *Ibid.*, *sec.* 134. See also as to mistake, 1 *Pet.*, 1, *Hunt vs. Rousmaniere.* I cannot add anything to the argument of Judge Brewer on the case in 1 *Pet.* The principles there laid down by Judge Washington are clearly applicable to this case, and the peculiarity of that on which the decision was finally made, shows how strongly this case appeals to a court of equity. Here there was no agreement as to the character of the instrument to be executed. The only agreement was, that a certain thing should be done; and an agent of the parties undertaking to do the thing, did not do it because he did not know how, or did

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not understand the directions or intentions of the parties. In consequence of his ignorance both of the law and of the facts, the very thing was done which they did not wish done, and what they wished was left undone. Now that there was no fraud in any part of this case has been established by the court of chancery, and no appeal was taken from the chancellor's decree. If it was all *bona fide*, why should the plaintiffs have the benefit of this property during the life of Tydings? It was not designed that Tydings should have any interest, and the paper that gave him any was made under a mistake both of the facts and of the law. I do not see how the principles of law laid down in *Hunt vs. Rousmaniere*, 1 *Pet.*, 1, can be got rid of. Now can anything be clearer, than that the parties concerned in the conveyance in this case were entirely mistaken in the whole matter? Can there be a doubt, but that they intended that Mrs. Tydings and her children should have the property in question free from responsibility for the debts of Mr. Tydings, known at the time to be embarrassed, and who was actually selling this very property to pay one, and that not the largest of his debts? I think there can be no question about it; and I feel confident that the case is one loudly calling for equitable interference; and that a court of equity, according to its established principles of action, has power to give the relief now asked for.

ECCLESTON, J., delivered the opinion of this court.

Sometime prior to the year 1848 Roger Tydings, one of the defendants, purchased, and paid for, the property now in controversy, but never received a deed for the same from the vendor, Thomas R. Beard. But on the 8th of January 1848, Beard and wife, by a deed of bargain and sale, for the consideration of $144, as therein stated, conveyed the property to Mary R. Tydings, (the wife of R. Tydings,) her heirs and assigns, in fee-simple. Subsequently the defendants, Anderson and Hall, and Davidson, filed a bill in equity for the purpose of vacating the deed as fraudulent and void. During the pendency of that suit Mary Ann Tydings died. The chancellor did not think the deed void for fraud, and concluded

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his opinion in the following language: "The deed, therefore, in my opinion, must be permitted to stand; and as the complainants can reach Roger Tydings' interest as tenant by the curtesy, by an execution at law, (if he is entitled to such interest,) this court should not interfere and grant relief to that extent. The bill, therefore, will be dismissed." After that decision the appellants issued executions upon their judgments against R. Tydings and caused them to be levied upon the disputed property, upon the ground that he had a life estate therein, as tenant by the curtesy. For the purpose of enjoining those executions, and also of reforming the deed to Mrs. Tydings, so as to make it consistent with the real intention of the parties, the present bill was filed. It alleges that R. Tydings was much embarrassed, and owed, amongst other debts, one of about $500 to John F. Nicholson, his brother-in-law, who was pressing him for its payment; that Nicholson owed about the same amount to his mother, Mrs. Elliott, who was also the mother of Mrs. Tydings; that Nicholson was willing to pay his mother by applying his claim against R. Tydings for that purpose, and it was finally agreed that Mrs. Elliott should take, in full payment of her claim against her son, the property purchased by R. Tydings from Beard, which arrangement was to be in satisfaction of the debt due to Nicholson by R. Tydings. The bill also alleges, that Mrs. Elliott agreed, in this mode, to purchase the property for the benefit of her daughter, Mrs. Tydings, and her children, "or for her benefit, so that it should not be in any way subject to the debts" of her husband, and that he should have no interest therein; that it was the design of Mrs. Elliott, Nicholson and R. Tydings, that the latter should have no interest in the property; and when he, (R. Tydings,) gave directions for drawing the deed, he told the conveyancer it was to be for the benefit of his wife, (Mrs. Tydings,) but through the unskillfulness of the conveyancer and the ignorance of the parties, as to the proper plan of conveying the property to Mrs. Tydings, so as to prevent her husband from having any legal interest therein, instead of such a deed as would have carried into effect the intention of the parties, the one prepared was that which ap-

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pears to have been executed on the 8th of January 1848, by Thomas R. Beard to Mary Ann Tydings.

Under the sale from Beard to Tydings, the latter, having paid the purchase money and obtained possession, had a full equitable title to the property, the former holding nothing but the dry legal title, which he conveyed to Mrs. Tydings with the consent and authority of her husband. As we understand the allegations in the bill, R. Tydings was induced to unite in the arrangement, which resulted in the conveyance to his wife, in consideration of that arrangement being a payment in full of his debt to Nicholson. The chancellor speaks of this transaction, in the former case, (3 *Md. Ch. Dec.*, 167,) as giving preference of one creditor over others. Under some circumstances a debtor may do that, provided the instrument designed to effect the object contains the requisite provisions. But if in consequence of a *mistake in law*, the parties select and make use of such an instrument as cannot effect their intention without the aid of a court of equity, the court will not correct the mistake, by reforming the instrument, to the prejudice of the general creditors of a debtor in very embarrassed circumstances.

In *Hunt vs. Rousmaniere's Adm'r*, 1 *Peters S. C. Rep.*, 1, the object which the parties had in view is clearly shown. And it is equally evident they supposed the instrument made use of would as effectually accomplish their object as a mortgage could. The intention being clearly established, it was insisted that as the failure to carry it into effect resulted from a mistake, in regard to the proper means of doing so, the complainant might claim the aid of a court of equity to place him in the same condition he would have been if the appropriate instrument had been used. But the court refused the relief asked for, and conclude their opinion by saying: "If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff, would, we think, be sufficient to induce the court to leave the parties where the law has placed them."

That was the case of a mistake in law. And here, after stating the arrangement, the bill alleges that the deed was prepared and executed in its present form, "through the un-

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skillfulness of the conveyancer and the ignorance of all the parties as to the proper plan of conveying the property to Mary A. Tydings, so as to prevent R. Tydings from having any legal interest therein." This averment, in connection with the evidence given by the witnesses of the complainants, shows, that if any mistake occurred in regard to the present deed, it was a mistake in law. And one which, perhaps, would never have been thought of but for the decease of Mrs. Tydings, leaving her husband the survivor.

Supposing the arrangement now before us was clear of fraud, if the deed had given Mrs. Tydings the property for her sole and separate use, she might have held it free from any right of the defendants claiming under their judgments obtained since the deed. But as that instrument gave her a common fee-simple estate, which at her decease left in her surviving husband a life estate, as tenant by the curtesy, and therefore liable to execution, the question is, whether a court of equity will reform the deed because of the alleged mistake, and exclude the judgment creditors by injunction?

Admitting that, as between the complainants and their father, the deed would be reformed on account of the mistake, it is by no means a necessary consequence that it should be reformed in prejudice of the creditors, whose judgments are based on claims existing prior to the deed.

By agreement the proceedings in the former suit in equity are made evidence in this. There it will be seen the chancellor sustained the validity of the deed against the allegation of fraud, chiefly, if not exclusively, upon the ground that by means of the deed the debt due from Tydings to Nicholson was satisfied, and that the former had a legal right to give the latter a preference over the complainants in that suit, who are defendants, and the judgment creditors in this. In this view of the subject it is evident those defendants stand upon quite as equitable ground as the parties claiming under the deed, or under the arrangement which caused the deed. The object of the parties to that arrangement, no doubt, was, by a legal conveyance, to shut out the claims of the creditors of R. Tydings, and if such a conveyance as could have produced

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that effect had been executed, the legal advantage obtained thereby would have been made use of. But inasmuch as, by a mistake in law, and the subsequent death of Mrs. Tydings, the legal advantage is given to the creditors, a court of equity will not deprive them of that advantage for the benefit of those whose claim rests upon no stronger equity than theirs.

In 1 *Peters*, whilst the Supreme Court do not say there are no cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law, they seem very plainly to maintain that, as a general rule, equity will not relieve in such cases. And speaking in reference to the particular case before them they say: "If the court would not interfere in such a case, generally, much less would it do so in favor of one creditor against the general creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself." In the case before us the parties do not stand upon equal ground at law, but the creditors have the advantage at law, with equal equity, and seeking no relief from a court of equity, they only ask to be permitted to exercise their legal rights.

In an action of *assumpsit*, (*Henderson vs. Mayhew, et al.*, 2 *Gill*, 409,) the court say: "Parol evidence is inadmissible to change or contradict the terms of a written instrument. Strangers to the instrument, when authorised to impeach or contradict it, may offer parol testimony for that purpose; and so a grantor may in a controversy with the grantee, if he charges the same to have been obtained by fraud or mistake. But the parties to a written instrument are not permitted, in controversies with strangers, to insist that it does not express what it was intended to express. The appellants, after obtaining an absolute deed, and authorising the community to regard them as the owners of the vessel, cannot now, for their own benefit, be permitted to allege that their bill of sale is a mortgage." And the court also say: "The party here, who is a stranger to the deed, insists, that it is what it purports to be, and the appellants who accepted it are precluded from offering the evidence on which they rely, in order to defeat the action against them."

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This case shows a willingness to afford the immediate parties to an instrument the privilege of correcting its errors, arising from mistake, when the controversy is between themselves, but much aversion to permitting such corrections when the rights of strangers are involved. But without resorting to this decision at law as an authority in the present case in equity, we think the principles established by the Supreme Court, in the chancery suit of *Hunt vs. Rousmaniere's Adm'r*, are sufficient to show that the complainants are not entitled to the relief they seek against the defendants, who are creditors of R. Tydings.

The counsel for the appellees says, that in the former suit R. Tydings, in his answer, disclaimed any interest in the property in question; and that such disclaimer in a court of equity will exclude the creditors from any right to claim through him the payment of their judgments, or to levy executions upon the property after the decease of Mrs. Tydings. But if, under different circumstances, the disclaimer could have the effect ascribed to it, yet, as the judgments bear date prior to the disclaimer, they were liens upon the legal right, which, by the character of the deed, was vested in R. Tydings, and no subsequent act of his could destroy those liens.

Although it should be admitted that the act of 1841, ch. 161, prohibited the sale of the property under the judgments during the life of the wife, that act still left in the husband the same life estate which he would have had prior to the passage of the law, upon which estate the judgments were liens, subject to stay of execution until the death of the wife. A judgment with a stay of execution, according to express terms, until the happening of a contingency, or until a future specified time, notwithstanding the stay, is a lien upon the real estate of the defendant during the stay. An injunction stops an execution, but the lien of the judgment is not lost or suspended even during the continuance of the injunction. *Murphy vs. Cord*, 12 *G. & J.*, 182.

Entertaining the views expressed in this opinion, we will reverse the decree below, for the purpose of dissolving the injunction, with costs to the creditor defendants, and dismiss

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the bill, but without prejudice to the rights of the complainants in reference to any interest or right which R. Tydings may have in the property in contest, or the proceeds thereof, after the judgments are satisfied; and a decree for such purposes will be signed.

Decree reversed.

David U. Brown *vs.* Rebecca Somerville.

On the *second* appeal in a case whatever principles were settled on the *first* appeal must govern the appellate court, unless the record shows a materially different case.

A pending attachment may be pleaded in *abatement* to a suit against the garnishee by the defendant in the attachment, but to constitute a *bar* to such a suit there must be judgment of condemnation followed by *execution executed*, or *payment* or *satisfaction*.

The act of 1715, ch. 40, sec. 7, places *credits* upon the same footing as *goods and chattels*, and permits the garnishee to plead the attachment in *bar* only when it has proceeded to judgment *and execution had and made*.

The words of an act may be disregarded where that is necessary to arrive at the intention of the law-makers, but not where the act admits of only one interpretation.

The defendant in the attachment may sue the garnishee on the attached *chose* at any time before payment of the judgment of condemnation, or execution executed thereon, and recover, unless the garnishee pleads the pending attachment in *abatement*.

The judgment in attachment does not *extinguish* the garnishee's *debt* to the defendant; the debt is attached as something belonging to the defendant and not as a debt due by the garnishee to the plaintiff, and the defendant has an interest in having that credit applied to the payment in whole or *pro tanto* of his debt to the plaintiff.

An attachment without satisfaction will not, of itself, prevent the plaintiff in the attachment from resorting to his original debtor.

A judgment of condemnation was rendered against a garnishee for $10,000, and before execution issued thereon he was sued by the holder of a promissory note for $822.19, which was one of the *attached choses*, he being the maker thereof. Pending this suit he *purchased* the judgment from the plaintiff in the attachment for $2300. Held:

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That this purchase was no defence to the suit, because the *whole debt* was not paid; as between the plaintiff in the attachment and the garnishee the judgment was closed, but the defendant in the attachment had an interest in having the *whole debt* paid, and the garnishee occupies no better position than if any *other person* had purchased the judgment who could have compelled the garnishee to pay the whole debt, or after exhausting his remedy on the judgment have resorted to the defendant in the attachment for the balance.

The attachment process has always been strictly construed, and required to be pursued according to the statute.

APPEAL from Baltimore County court.

This is the *second* appeal in this case, the first being reported in 5 *Gill*, 399. The action was *assumpsit* by the appellant against the appellee, docketed by consent, at November term 1844, upon a promissory note for $822.19, drawn by the appellee in favor of W. T. Somerville or order, dated the 1st of November 1841, and payable in two years and six months, and endorsed by the payee to the appellant. Plea, *non assumpsit*.

Exception. The facts of the case necessary to be stated are briefly these: In October 1841, the defendant, Rebecca Somerville, being indebted in her own name, and as executrix of her husband, to Charles Tiernan, surviving partner of Luke Tiernan & Sons, in a debt of $5000, gave him her five notes for $1000 each, payable, respectively, in one, two, three, four and five years, all drawn to the order of W. T. Somerville and by him endorsed. A few days after these notes were given an attachment on a judgment for $10,000, against Charles Tiernan, was sued out of Baltimore county court by the Bank of New Orleans, the plaintiff therein, against the goods, chattels and credits of said Charles Tiernan, and the same was accordingly, on the 2nd of November 1841, laid in the hands of Rebecca Somerville and W. T. Somerville, the drawer and endorser of these notes. Charles Tiernan continued the holder and owner of these notes until May or June 1842, when he transferred the note of $1000 first due to William H. Tiernan to pay certain of his creditors, and the other three to Thomas Penny, also his creditor, and shortly *thereafter* applied for the benefit of the insolvent laws.

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In June or July 1842, William H. Tiernan presented the note of $1000 so transferred to him to Mrs. Somerville, who refused to pay it on the ground of the attachment; and on the 20th of October 1842, when the note was about to mature, she paid, through her agent, William T. Somerville, $100, and for the balance gave two other notes, one at sixty days for $150 to Mr. Nelson, and the other, (being the note sued on,) for $822.19, dated back November 1st, 1841, to correspond with the original note of $1000, and by agreement with William H. Tiernan and the said agent of Mrs. Somerville made subject to the original attachment.

On the 27th of January 1843, as appears by the docket entries, judgment of condemnation was rendered in the attachment case on verdict against the garnishees for $10,000, with interest, "subject to agreement filed," *viz:* "This judgment to be released on payment of $500 on the 1st of May, 1843, of $500 on the 1st of November 1843, of $822.19 on the 1st of May 1844, of $1000 on the first days of November 1844, 1845, 1846, respectively, and of $2000 on the 1st of November 1847, with a stay on the several amounts as they become due." It was also proved that Charles Tiernan, the attachment debtor, employed counsel to defend this attachment suit, and that the verdict therein was taken and rendered by consent of parties to the suit and in pursuance of the agreement set forth in the judgment.

On the 11th of November 1843, the note of $822.19 having thus been in the possession of William H. Tiernan, came to the hands of the plaintiff in this case, David U. Brown, through one Smith, *bona fide* and for value. In December 1847, the Bank of New Orleans having failed, the judgment in attachment was sold in New Orleans and bought by the defendant, Mrs. Somerville, for $2300, and paid for by her, and the bank thereupon handed back to her three notes, one for $1000, and two for $500 each, which had been originally given by her to Charles Tiernan in 1841, and after the attachment passed by him to Penny. The bank came into possession of these notes by intervening and claiming them of Penny; who attempted to sue the endorser thereof, the bank claiming them

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as having been bound by the attachment in Baltimore, and that claim being sustained by the court in New Orleans. Upon these facts the plaintiff asked instructions in substance, as follows:

1st. If the jury find the note was made by the defendant, endorsed by the payee, and passed to the plaintiff *bona fide* and for value, and that it was made and delivered by defendant to or for the benefit of William H. Tiernan after the attachment offered in evidence was laid in her hands, and that the original note of $1000 had been passed to said William, as stated in the testimony, then the plaintiff is entitled to recover, notwithstanding the jury may find, that William H. Tiernan agreed with the endorser, William T. Somerville, that said note should be subject to said attachment; provided they also find that the note for $1000, mentioned in the testimony, was passed away to William H. Tiernan for the consideration mentioned in the testimony, before Charles Tiernan applied for the benefit of the insolvent laws.

2nd. If the jury believe the judgment in the attachment was rendered on an agreement for a judgment, or admitting an amount as due by the garnishee in the terms of the agreement, made part of the attachment proceedings, and that thereupon the verdict by consent was taken upon which the said judgment was rendered, and all the facts put in the preceding prayer, then the plaintiff is entitled to recover.

3rd. If the jury find all the facts set forth in the preceding prayers, and that the attachment judgment was bought by the defendant for $2300, in December 1847, and that in consideration of that payment, the plaintiff in attachment surrendered to her three of the notes attached in her hands, two of $500 each and one of $1000, and that these notes were of those mentioned in the testimony as passed to Penny, and shall believe they were so passed, then the plaintiff is entitled to recover, if the jury find that said notes, with interest to the period of the purchase of the judgment, amounted to $2300.

The defendant then asked an instruction, that if the jury find that Mrs. Somerville, in October 1841, settled with Charles Tiernan for all liabilities of herself and of her deceased husband,

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by giving to him the notes specified in his receipt; and that in November, immediately thereafter, the attachment of the bank given in evidence was laid in her hands as garnishee; and that Charles Tiernan, being still the holder of the original note for $1000, employed the counsel who appeared to defend the attachment cause, in January 1842; and that he, in May 1842, gave said note to William H. Tiernan, to collect and apply its proceeds to certain of his creditors; and that in October 1842, the note sued on in this case was made and given by defendant, through her agent, William T. Somerville, to William H. Tiernan, in part renewal of said $1000 note and expressly subject to the attachment cause, which was then undecided; and that judgment was given on the 27th of January 1843, in said attachment cause, against defendant, as garnishee, for the amount therein stated, then the plaintiff is not entitled to recover.

The court (FRICK, C. J., and LE GRAND, A. J.,) refused the plaintiff's prayers and granted that of the defendant. To this ruling the plaintiff excepted, and the verdict and judgment being against him, appealed.

The cause was argued before ECCLESTON, TUCK and MASON, J.

Isaac N. Steele and *Chas. F. Mayer* for the appellant, argued:

1st. Even if this court shall adhere to the decision given in the former hearing of this case, the appellant is entitled to judgment on the note shown to have been passed from Tiernan before he applied for the benefit of the insolvent laws, and as a *new note* (cleared of all possible bearing of the attachment) issued by the appellee *after the attachment was laid*. *Drake on Attach., sec.* 219. 5 *Gill*, 399. *Story on Prom. Notes, secs.* 91, 181. 1 *Md. Rep.*, 516, *Hunter vs. Van Bomhorst & Co.*

2nd. The agreement, (even if it existed,) that the new note should be subjected to the attachment, cannot affect the rights of the appellant, an innocent holder, without notice of any such equity attending the note. Besides which, that pretended stipulation, being merely oral, cannot control the writ-

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ten terms of the note and is incompetent testimony, or ought not to have any effect given to it by the court. *Chitty on Bills*, 162. 3 *Camp.*, 57, *Hoare vs. Graham*. 1 *Starkie's Rep.*, 361, *Rawson vs. Walker*.

3rd. The attachment judgment has no effect, because it was, as is *now shown*, obtained on a verdict *by consent*. The only operative effect of a judgment rests upon its *coercive* and *involuntary* character. It can bind only parties and privies. The plaintiff in this case was not a *privy* with Charles Tiernan, and did not even obtain this note from *William H. Tiernan*. There must be nothing of the *volunteer* on the part of the garnishee in obtaining the judgment of condemnation, if he wishes it to be a *protection* to him against a suit by the defendant in the attachment. For these positions, see *Act of* 1715, *ch.* 40, *sec.* 3. 5 *Gill*, 399. 1 *H. & G.*, 492, *Taylor vs. Phelps*. 4 *G. & J.*, 414, *Charlotte Hall School vs. Greenwell*. 4 *Rawle*, 100, *Coates vs. Roberts*. 2 *Kent's Com.*, 109. 22 *Ala.*, 767, *Winston vs. Westfeldt*. 1 *Greenlf. on Ev.*, *secs.* 529, 530, 536. 10 *Eng. C. L. Rep.*, 345, *Barough vs. White*. 16 *Do.*, 220, *Shaw vs. Broom*. 20 *Do.*, 351, *Beauchamp vs. Parry*.

4th. The settlement by Mrs. Somerville of the attachment judgment, by an amount which left her exonerated from the amount of this claim, debars her all benefit of the attachment condemnation, whether the defence on that ground be an equitable or legal one. A garnishee is *a trustee*, and when any party, acting in a fiduciary capacity, compromises a claim, he does so for the benefit of the estate, the *cestui que trust*, and not for his own benefit. 3 *H. & J.*, 99, *Turner vs. Bouchell*. 12 *G. & J.*, 36, *Hall vs. Creswell*.

5th. The attachment judgment is not of any effect, and (even putting out of view all the grounds now on the new testimony presented) cannot avail as a *bar* to this claim, because not followed by execution and satisfaction thereon. A pending attachment may be pleaded by the garnishee in *abatement* of a suit against him by the defendant in the attachment, but to constitute a *bar*, there must be judgment and payment or satisfaction thereof, or *execution executed*. *Act of* 1715, *ch.* 57

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40, *sec.* 3. 13 *Pick.*, 511, *Meriam vs. Rundlett.* 8 *Georgia*, 549, *Brannon vs. Noble.* 3 *H. & McH.*, 594, *Davidson vs. Beatty.* 2 *H. & J.*, 96, *Owings vs. Norwood.* 1 *Saund. Rep.*, 67, *Turbill's case, and note.* 5 *Eng. C. L. Rep.*, 160, *Wetter vs. Rucker.* 2 *Watts & Sergt.*, 210, *Lowry vs. Lumbermens Bank.* 1 *Greenlf. on Ev., secs.* 531, 533. 2 *Kent's Com.*, 388.

6th. The decision of the Court of Appeals in the former case will be very strictly construed, and limited to the facts literally as the case then exhibited them. Such a construction is but just of positions that so oppressively affect commercial interests, and so contravene the negotiableness of promissory notes. And we claim that this decision will be reconsidered by the court if it shall be necessary to do so in order to the justice of this case, and to restore our law to the consistency with the faith of the doctrine, which allows a *negotiable promissory note to be negotiated. Drake on Attach., secs.* 577, 599. 1 *H. & J.*, 536, *Steuart vs. West.* 5 *New Hamp.*, 502, *Stone vs. Dean.* 11 *Verm.*, 309, *Hinsdill vs. Safford.* 13 *Do.*, 341, *Hutchinson vs. Evans.* 4 *Dallas*, 47, *Ludlow vs. Bingham.* 2 *Bailey*, 441, *Gaffney vs. Bradford.* 14 *La. Rep.*, 449, *Sheets vs. Culver Ibid.*, 511, *Kimball vs. Plant, et al.* 9 *Iredell*, 116, *Myers vs. Beeman.* 11 *Do.*, 564, *Ormond vs. Moye.* 3 *Conn.*, 27, *Enos vs. Tuttle.* 12 *Ala.*, 96, *Mills vs. Stewart.* 22 *Do.*, 760, *Winston vs. Westfeldt.*

William B. Perine and *William H. Norris* for the appellee, argued:

1st. That no error can be imputed to an inferior tribunal in having obeyed the principles established by the Court of Appeals on a preceding appeal in the same case. 1 *Md. Rep.*, 324, *Thomas vs. Doub. . Ibid.*, 394, *Young vs. Frost.* 3 *Do.*, 188, *Emory vs. Owings.* 4 *Do.*, 164, *Hammond vs. Inloes.* 6 *Do.*, 97, *Preston vs. Leighton. Ibid.*, 231, *Mitchell vs. Mitchell.*

2nd. The Court of Appeals on the former appeal, 5 *Gill*, 399, established two principles, either of which entirely sustains the defendant's prayer. 1st. That a promissory note is

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a *credit* in view of our attachment laws, and its negotiability is, by force of the attachment, arrested, if the defendant in the attachment is the holder and owner of note at the time the attachment is laid in the hands of the maker, and no action can be maintained on the note or the debt it represents by a subsequent endorsee or transferee, though he receive it *bona fide* for value and without actual notice of the attachment, provided a judgment is fairly obtained in the attachment suit to the extent of the debt or credit attached. And this principle was properly ruled. The case has been treated throughout as if it was an attachment to compel appearance, whereas it is an attachment by way of *execution* on *final judgment*. In England money due on a bond or contract may be attached before the day of payment. *Bac. Abr., title, Customs of London, letter (H.)* 2 *Comyn's Digest, title, Attachment, letter (C.)* The court in the former case said negotiable notes were attachable upon the ground that a subsequent statute could modify a prior one, and the statute of Anne could be and was modified by our attachment laws. The case of *Steuart vs. West*, 1 *H. & J.*, 536, is the very case at bar. The county court in that case was *divided* as to the question, whether a promissory note was attachable *at all*, and the General Court upon appeal decided that it was *attachable*. Settling this principle the court, in 5 *Gill*, say, it settles the principle of this case, because the law of *executions* is superinduced upon this attachment *on judgment*. It gives a *lien*, and the moment this is done there can be no transfer to defeat the claim of the execution creditor. *Act of* 1715, *ch.* 40, *sec.* 7. In an attachment by way of execution no *capias* clause is inserted as in an attachment to compel appearance, but it is in itself an execution, and is to be governed by all the laws relating to executions. 7 *Md. Rep.*, 102, *Griffith vs. Etna Fire Ins. Co. Ibid.*, 404, *Boyd vs. Talbott.* 3 *Gill*, 241, *Baldwin vs. Wright, et al.* See also on this point the *Acts of* 1824, *ch.* 74, *sec.* 1, and 1834, *ch.* 189. 7 *Md. Rep.*, 368, *Martin vs. Martin.* 16 *Verm.*, 594, *Chase vs. Haughton.* 13 *Mass.*, 153, *Hull vs. Blake.* 16 *Do.*, 304, *Parker, et al., vs. Danforth.* 4 *Md. Rep.*, 280, *Peacock vs. Pembroke.*

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But it is said this doctrine interferes with the commercial law respecting the negotiability of promissory notes. But this commercial law is made for *makers* as well as *takers* of notes. An alteration in a note protects the maker or acceptor, (*25 Eng. Law & Eq. Rep.*, 125, *Burchfield vs. Moore*,) and the law visits the consequence of notice in cases where the parties could have no *actual notice*. 2 *Rand.*, 93, *Newman vs. Chapman*. 1 *Story's Eq.*, *secs.* 405, 406.

3rd. The other principle decided on the former appeal is, that if no objections are interposed by the parties owning the note or debt during the progress of the attachment suit, having notice of the attachment and defending it, and the garnishee has had judgment given against him by a court of competent jurisdiction, because the garnishee could not deny the debt of the defendant in the attachment, nor the fact of the garnishee's indebtedness to the defendant in the attachment, then such judgment of condemnation is a perfect bar and protection to the garnishee against any suit by a party on any part of the debt attached, deriving title under the attachment debtor subsequently to the levy of the attachment. And this principle was properly ruled. 13 *Mass.* 153, *Hull vs. Blake*. The first objection to this judgment is, that it was rendered by *consent*. But how does this affect the case? Mrs. Somerville could not deny that she owed the money and there was nothing left for her to do except to give judgment. She was not bound to resist the judgment to the last. But besides this the same proof and the same judgment, the docket of entries of which showed it was given by consent upon terms filed, was in the *former record*, and the only new proof is now the oral declaration of the same fact which was apparent from the docket entries which were before the court on the former appeal. Another objection is, that the judgment is not a bar unless followed by payment or *execution executed*. The English decisions upon the Custom of London are cited to sustain this position. The earlier English cases show that the judges of the common law courts treated with contempt and constantly endeavored to get rid of these attachments, these judgments of the Lord Mayor's Court. They would not permit

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this *Pie Poudre* court to interfere with the higher courts of common law, and they even went so far as to deny that a pending attachment could be even pleaded in *abatement*. 1 *Saund. Rep.*, 67, *Turbill's case*, *note* 1. 1 *Eng. C. L. Rep.*, 311, *Smidt vs. Ogle*. 5 *Do.*, 164, *Wetter vs. Rucker*. These were decisions in *Lord Holt's* time. The modern English decisions, however, have more favored these attachments. *Drake on Attach., sec.* 729. But the answer to all these cases is, that our attachment laws have modified and enlarged the English law upon this subject. The custom of London was exclusively a system to *compel appearance*. They had no such thing as an attachment by *way of execution*. Our State never intended, by its various attachment laws, merely to incorporate the narrow system of the custom of London, but these various laws have made an attachment on final judgment an *execution* of itself, the writ by which the fruits of his judgment are secured to the plaintiff in the attachment. Such a system is not to be watched, and scanned, and defeated wherever it can be, but should receive a liberal construction from the courts. Now as to the consequences: The guiding principle that pervades our attachment system is, that the garnishee ought not to be placed in any worse position than if the defendant in the attachment had himself recovered the judgment against him. *Drake on Attach., sec.* 415. They make an assignment in law to the plaintiff in the attachment of the debt due by the garnishee to the defendant. The attachment is a proceeding *in rem* or in the nature of one, and fixes the debt in favor of the attaching creditor. 13 *Pet.*, 151, *Wallace vs. McConnell*. 6 *H. & J.*, 23, *Tongue vs. Morton*. 2 *Md. Rep.*, 451, *Wright vs. Wright*. 2 *How.*, 338, *Grignon vs. Astor*. 9 *Do.*, 348, *Boswell vs. Otis*. 3 *Wheat.*, 312, *Gelston vs. Hoyt*. Our attachment laws permit an attachment to be laid in the plaintiff's own hands, and how is an *execution* to be got in such a case as that? For these reasons we insist that no *execution* upon the attachment judgment was necessary to render it a *bar* to a suit against the garnishee by the defendant in the attachment.

4th. The proof now shows, that the attachment judgment

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has been purchased by Mrs. Somerville, the garnishee in the attachment case. But how does this affect the case? She bought the judgment and of course is entitled to the benefit of her purchase. It is said the garnishee is a *trustee*. But who is the *cestui que trust?* It must be Charles Tiernan, or his permanent trustee in insolvency, or the bank, surely not this *appellant*. It is error to suppose, that if a party debtor pays his judgment debt by a less sum than the whole, he thereby gives to the holder of an improperly transferred security, which belonged of right to the judgment creditor, a title and claim which such holder would not have if the debtor had paid the judgment in full.

(The argument in regard to the effect of Charles Tiernan's application for the benefit of the insolvent laws, and as to the *form* of the prayers in the case, need not be stated.)

TUCK, J., delivered the opinion of this court.

Whatever principles were settled on the former appeal must govern this court on the present, unless the record shows a materially different case. This is the established doctrine, as shown by the authorities on the appellee's brief.

After a careful examination we can discover no such difference, except that it now appears that the note was passed by Charles Tiernan *before* his application under the insolvent laws, whereas the decision of one of the points on the former trial was placed on the ground that such transfer could not be made after his application; and it is now proved that the judgment of condemnation against the defendant has never been fully paid, but that, since the former trial, she has become the purchaser thereof for $2300, the debt being largely more than that amount, and the sum now claimed by the appellant.

It is supposed that this record shows, as an additional fact not proved in the other case, that the judgment of condemnation was entered by agreement of the parties. But we think it manifest that this fact was known to the court on the first appeal. The same copy of the docket entries is set out in both records, and the parol proof now offered, that the agreement was made, does not make a new matter of that which

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was before established. The point is, was the same fact proved, not whether the evidence of the fact is the same or different. The court unquestionably dealt with the judgment, as we must, as a valid proceeding.

There being no question raised as to the validity of the transfer of the note by Charles Tiernan, in view of the insolvent laws, the additional evidence in that behalf need not be noticed. The only subjects, therefore, for our consideration are, whether it was necessary for Mrs. Somerville to have shown that the judgment in attachment had been followed by execution executed, or satisfaction, as a complete defence to this action; and whether the part payment of the judgment, by the purchase thereof, can enure to her benefit, she having, by that purchase, gotten rid of a larger portion of her judgment debt to the bank than will pay the amount claimed in this suit.

The first of these propositions was not decided on the former appeal. It does not appear by the statements and points filed by the counsel, or by the reporter's notes of the argument, to have been adverted to, or in any manner brought to the notice of the court. The reported case shows very clearly that, with the exception of a point arising under the insolvent laws, the only question discussed in the opinions filed was, whether the note in suit could be attached, which did not necessarily involve the point now made on this appeal. We consider ourselves, therefore, at liberty to treat it as a case of first impression in this State, depending upon the attachment laws, and the decisions in England and in this country.

The words of the act of 1715, ch. 40, sec. 7, admit of no controversy as we think. They provide that the "condemnation *and execution* of such goods, chattels *and credits*, of the said garnishee, *had and made*, shall be sufficient and pleadable in bar by the garnishee in any action against him, by the defendant, for the same." It is not pretended that the judgment of condemnation of lands or goods, without execution, would bar the defendant's suit against the garnishee; but it is said, that in a case of attachment against credits in the hands of the garnishee, the judgment operates as a general judgment against him, binds his property like any judgment *in personam*,

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and may be made by execution levied on any of his property. It must be conceded that this view applies to attachments such as the one relied upon here, and has no force whatever where property is taken under the writ; and that, therefore, the two kinds of process might well have been placed on a different footing, by making the condemnation, where credits only are attached, a bar to the other suit. But if the legislature has employed language embracing goods, chattels and credits, in the same sentence, dealing with each by a proceeding *in rem*, from the writ of attachment to the judgment of condemnation, which of itself implies that the thing attached, whether chattel or credit, is the subject of the judgment, and protects the garnishee only when the attachment case has proceeded to judgment and *execution, had and made*, we cannot give the language a construction different from its plain meaning. The words of an act may be disregarded when that is necessary to arrive at the intention of the law makers, but not where the act admits of only one interpretation. Our attachment system was derived from that of England, and the words now under consideration, as they stand in the act, are in conformity with the decisions there, before and since its passage. We must suppose that the act was framed with reference to that system, and when the operation and effect of this process are considered, it will appear, we think, to be in conformity with the distinction between judgments *in rem* and *in personam*. If the judgment operated as an extinguishment of the garnishee's indebtment to the defendant in the attachment suit, it might be relied upon in bar as a former recovery. But this is not so. The credit is attached as something belonging to the defendant, not as a debt due by the garnishee to the plaintiff, and the defendant has an interest in that credit being applied to the payment in whole, or *pro tanto*, of his debt to the plaintiff. No distinction appears to have been recognised between credits and specific property. All alike are made the subject of condemnation, and are dealt with in the same manner. The condemnation of the thing attached to the purposes of that suit, and its application to the payment of the defendant's debt to the plaintiff, is considered as made when an execution has

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issued and been executed, according to the law of England, or by either payment or execution executed, according to the decisions in the States in which the law of attachment has been introduced, execution being considered only as a mode of enforcing payment. At any time before such application has been made the defendant may sue his debtor, the garnishee, on the attached *chose*, and recover, unless he pleads the pending attachment in abatement. If it has progressed to judgment and payment, or execution executed, this constitutes a defence in bar.

It will be seen that this view of the law does no injustice to any of the parties, if they adopt the proper mode of proceeding. The plaintiff in the attachment cannot complain if, having neglected to prosecute the remedy of his choice, according to the exigency of that process, he ultimately loses its benefit, and the garnishee incurs no risk of a payment to both his own creditor and the plaintiff in the attachment, because, as we have seen, he may, in one condition of the attachment case, make it the ground of abating the defendant's suit against him, and in the other aspect may defeat it altogether. For the law of England on this subject, see 1 *Saund. Rep.*, 67, *Turbill's case. Comyn's Digest, Attach. H. Locke on Attach.*, (79 *Law Lib.*) *Magrath vs. Hardy*, 4 *Bing. N. C.*, 782. *Wetter vs. Rucker*, 1 *Brod. & Bing.*, 491.

In Maryland we have no reported adjudications on this part of the law; nor are we aware that any cases have occurred at *nisi prius* from which we can learn the construction of the act of Assembly by our courts. In *Hinkley on Attachment*, it is said, that it is not the custom to take execution merely for the purpose of arming the garnishee with a defence; but he asks, "if the garnishee pays the judgment without execution, may he not plead the judgment and satisfaction, with the like benefit, as he might the judgment and execution?" We agree with the author that "it is reasonable that he should, inasmuch as execution is only a means of obtaining satisfaction." Those views are in accordance with the New York and Pennsylvania cases, where the point has been adjudicated. *Embree vs. Hanna*, 5 *Johns.*, 101. *Irvine vs. Lumbermens Bank*, 2 *Watts &*

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Sergt., 190. *Ib.*, 210. In the latter of these cases, (2 *Watts & Sergt.*, 214,) where a judgment of condemnation had been entered, but no satisfaction or execution, the court said: "To entitle a garnishee to a plea in bar, it must appear that he has been compelled to pay the money attached in his hands, or, what is the same thing, that an execution has been executed by seizure and levy on *his* property." And in 2 *Watts & Sergt.*; 208, the law is very clearly stated, as follows: "If after a foreign attachment has been issued, and been executed in the hands of the garnishee, the original debtor sues the garnishee for the debt, he may plead the attachment in abatement. But if the plaintiff in the attachment has obtained judgment against the garnishee, and received the money, or execution has been executed, and the original creditor shall afterwards sue the garnishee for the debt, he may plead the condemnation in the foreign attachment, and this will be an effectual bar for the amount. If the judgment in the attachment is equal to, or exceeds the amount demanded from the garnishee on the original debt, it is a flat bar; if for less, it is a bar *pro tanto* only. And the distinction between pleas in abatement and in bar is not technical, but necessary to prevent injustice. When pleaded in abatement, after the disability is removed by disproving the debt, as may be the case, the plaintiff may renew his suit; but if pleadable in bar this cannot be, and the plaintiff may be exposed to have the claim of the attaching creditors defalked, although it may be afterwards disproved, and the garnishee may be allowed for a debt which he may fail to pay. The plaintiff may be defalked and afterwards compelled to pay the attaching creditors the amount of their debts; for an attachment without satisfaction would not, of itself, prevent them from resorting to their original debtor." It is scarcely necessary to observe that the same principles apply to cases of attachment on judgment, authorised by the act of 1715, ch. 40, as to foreign attachments. This doctrine has been sanctioned by the Supreme Court, in the case of *Wallace vs. McConnell*, 13 *Peters*, 136, where the maker of a note, in an action by the payee, pleaded that *after* the commencement of the suit on the note, the debt

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had been attached by a creditor of the payee, and a judgment of condemnation entered, with a stay of execution, and the court ruled, on demurrer to the plea, that it was not a defence, because the attachment case was commenced after the suit was brought on the note; that if the attachment had been conducted to a conclusion, and the money recovered of the defendant, before the commencement of the suit, there could be no doubt that it might have been set up as a payment upon the note in question; and if the attachment was pending when suit was instituted on the note, it might have been pleaded in abatement, as necessary to the protection of the garnishee, the defendant in the suit on the note.

We are not aware of any case in which the judgment of condemnation has been held sufficient, of itself, to bar the action against the garnishee, except *Hull vs. Blake*, 13 *Mass.*, 153. But there the judgment of condemnation in the court of Georgia, relied on by the defendant, stated that the proceedings would, according to the law of that State, discharge the garnishee when sued by his original creditor.

In the case before us it appears that the debt was not paid, nor had an execution been issued and levied before this action was commenced. As we understand the law, and not one case to the contrary has been shown, the attachment cause was a pending proceeding and might have been pleaded in abatement, but could not be relied on in bar of the action, which brings us to consider the effect of the purchase, by the defendant, of the judgment against herself in 1847, after the suit was commenced.

If the defendant relies on this fact as a payment it cannot have the effect of barring the action, because she has not paid the whole debt, though, as between the bank and herself, the judgment is closed. The owner of the *chose*, however, has an interest in having the whole debt paid, because "an attachment without satisfaction would not, of itself, prevent the plaintiff from resorting to his original debtor." 2 *Watts & Sergt.*, 209. And for all the purposes of this case we must consider the present appellant as occupying the situation of Tiernan, whose debt was attached in Mrs. Somerville's hands,

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because she can make no defence on this record that she could not have set up against Tiernan. But then it is said, that the judgment is satisfied by the purchase. As between the parties to the purchase it is. But, as to the appellant or Tiernan, does the defendant occupy any better situation than if any other person had become the purchaser of the judgment and taken an assignment? We suppose not. It would enable garnishees to defeat the just rights of their creditors, holders of the credit attached, if by any arrangement of this kind the law could be turned from its course. According to the doctrines of the authorities referred to, any other purchaser of that judgment might have compelled her to pay the whole amount, or have proceeded against the Tiernans for the deficiency or balance due, after exhausting his remedy on the judgment of condemnation. It would be material in that state of case, to the Tiernans, that the claim of the bank, or its assignee, against them should be reduced by as much as could be recovered from Mrs. Somerville, and no arrangement by purchase or part payment, without their consent, could defeat that right; and we must bear in mind, that as Mrs. Somerville, by interposing the proceedings on the attachment, has subjected Brown to the predicament of the Tiernans, as if they were the now plaintiffs suing on the note, she cannot deny to him the benefit of any objection which they themselves could urge against her defence if they occupied his place as plaintiff against her.

The argument that this view of the question deprives the garnishee of the right to compromise with his creditor, the plaintiff in the attachment, which other debtors possess, proceeds, as we think, incorrectly, on the supposition that these judgments, before execution levied, have all the incidents of judgments *in personam*. If there be any hardship it is the fault of the statute by which, as was said in *Wetter vs. Rucker*, 5 *Eng. C. L. Rep.*, 165, "we are penned in." But when considered with reference to all its bearings it is not unreasonable that the law should be so. This attachment process seeks to dispose of a man's property without his consent, and in many cases without his knowledge, to the payment of his debts. It has always been strictly construed and required

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to be pursued according to the statute. The garnishee is expected to pay all he owes his own creditor as far as may be ascertained by the judgment of condemnation. He is dealing with the property or funds of another whom he owes, from which he has no right to take any thing for his own or the plaintiff's benefit, to the prejudice of the defendant in the attachment. If payment be made *bona fide*, or if an execution be issued and levied on the garnishee's property, it repels all idea or presumption of collusion between the plaintiff and the garnishee, and the whole effect of the recovery against the garnishee enures to the benefit of his original creditor by having it applied to that creditor's own debt to the plaintiff. If this result be accomplished he cannot complain, but he has ground to object to any arrangement by which he may obtain a credit for less than the whole amount of the *chose* which his creditor has condemned to his use.

According to these views of the case, we are of opinion that the court properly refused the *first* and *second* prayers offered by the plaintiff; but erred in rejecting his *third* prayer, and also in granting the defendant's prayer.

Judgment reversed and procedendo ordered.

William Logan *vs.* Charles McGill and Mary McGill, his Wife.

Since the act of 1841, ch. 161, the *rent* of a farm devised to a married woman cannot, *during the life of the wife*, be made liable to execution for the debts of the husband.

The first section of the act of 1842, ch. 293, enables a wife to acquire title to any property real, and to slaves, in the mode therein specified, without the intervention of a trustee.

The act of 1841, ch. 161, does not destroy the tenancy by the curtesy, but suspends the right of execution during the life of the wife, leaving the judgment lien perfect on the life estate of the husband, to be enforced on the death of the wife.

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APPEAL from the Circuit Court for Washington county.

This appeal was taken from a decision of the court below (PERRY, J.) upon a case stated, between the appellees, as plaintiffs, and the appellant, as defendant, the facts of which are sufficiently stated in the opinion of this court. The right of appeal to each party was reserved in the agreement of facts. The opinion and judgment of the court below was in favor of the plaintiffs. The opinion is as follows:

"I will not disguise the fact, that I have esteemed the true construction of the acts of 1841, ch. 161, and 1842, ch. 293, as a matter of much importance, and as affecting the interests of the community in regard to the marital and conjugal rights to such an extent, as to demand much investigation and care. The frequency with which I have been called upon to interpret their meaning, is evidence of the uncertainty and difficulty entertained in arriving at the legislative will. If those acts do design that the rents and profits of real estate, which has been acquired by a *feme covert* during coverture, should be exempted from execution against the husband, and such design can be seen, the court has no discretion, but is bound to respect it. On the other hand, if there should be found in the law any omission or that such was not intended, the judicial tribunals cannot usurp the legislative province, and supply that which is wanting to accomplish the intent of those acts; for as contended in such a case, the common law rule must apply. This is so fully established, I do not feel it necessary to refer to any authority except 2 *Binney*, 279, *Cresoe vs. Laidley*, and 1 *Bouvier's Law Dictionary*, 210.

"But is this a case to justify a resort to the common law doctrine? If the construction of the acts is adverse to the defendant, then the case is of course in that predicament which forbids their application, and, indeed, that which seems to me to be the only question for the court is, as to the rules of construing statutes and the intention of those acts.

"The cases of the *Canal Co. vs. The Rail Road Co.*, 4 *G. & J.*, 1. *Dulany vs. Tilghman*, 6 *G. & J.*, 464, and *The Mayor of Baltimore vs. Howard*, 6 *H. & J.*, 383, furnish the true rule by which statutes are to be construed, and establish

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the principle, that all statutes upon or relating to the same subject are to be interpreted *pari materia*, and that every part of the statute is to be considered to arrive at the intention of the legislature.

"With the doctrine of those cases as a guide, can we see the object intended to be accomplished by the acts of 1841 and 1842? By the terms of the former, the real estate acquired by marriage shall not be liable to execution during the life of the wife for debts due from the husband. This act standing alone, the question might be environed with much more embarrassment. But the legislature, by the act of 1842, provides, 'that any married woman may become seized or possessed of any property real, or of slaves, by direct bequest, devise, gift, purchase or distribution, in her own name and as of her own property.' Was it intended that the rents and profits of the land of the wife acquired during coverture should be taken for the debts of the husband? Whether the moment they become in the nature of personalty or a '*chose in action*,' they vest by operation of law in the husband and become liable for his debts, and if possessed or become due before his death, would pass and be transmissible to his representatives as a part of his estate?

"By the act of 1841, the real property acquired by marriage cannot be sold for the debts of the husband, and by the act of 1842 it is provided, 'that the receipt of the labor of slaves acquired during marriage shall remain to the husband;' but it makes no such provision in respect to the rents of the land. The real property having been acquired in the same relation, and she to be possessed or seized of it in her own name and of her own property, and no such right given in regard to its products as is in respect to the hire of slaves, the conclusion seems to be reasonable, that such was not intended to be the property of the husband. No one can doubt, that if the act did not provide for the right of the husband to the hire of the slaves, the same difficulty and question would arise as to that which now exists in regard to the rents and profits of the real estate. Is not then the absence of such a provision an indication that the legislature deemed it necessary in regard to the rents of the

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land? and does not the conclusion follow, as a necessary consequence, that the law-makers designed it should not be subject to the debts of the husband without that feature? The conjugal relation, by the common law, vests the legal title to land during coverture in the husband, and that title is subject (by the common law) to execution and sale. 2 *Kent's Com.*, 131. But by the act of 1842, the land thus acquired is to be held by the wife as 'her own and in her name.' The common law gives the title to the husband. The statute confers it upon the wife. By the former, the wife, during the life of her husband, has no present interest. By the latter, she has it entire, and 'as her own and in her name.' To give the land in her own name and as her property, and not to give the benefits incident to it in the same character, would be imputing to the legislature the design of conferring upon her a mere naked and formal title, without any advantage to attend it. A title for which no reason or necessity can be seen. We are to construe those acts *pari materia*. The act of 1841 forbids a sale of the land for the debts of the husband, and the act of 1842 vests the title in the wife, and yet all the profits of the land thus exempted from execution and which is held in the name of the wife, it is insisted, is to be liable. It may well be argued, that no good reason can be shown why there should be an exemption of the land and still the profits to be answerable, for if such is the case, would it not be disposing of the property in another shape? What is the land worth without the profits? It is that alone which imparts a value to it. Then it cannot be, as contended, that the act of 1842 leaves nothing but the legal title in the wife and still makes the rents liable for the husband's debts.

"It may be questioned whether more was not done by the act of 1841, and to give a different construction, is to impute, as before stated, to the legislature, the passage of unmeaning laws, and with having passed an act by which no apparent benefit was to be conferred. I cannot, in considering them together, do otherwise than believe that the legislature certainly did intend to confer a benefit upon the wife.

"It has been insisted, that there cannot be a separate estate

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in the wife, because technical language, by which such an estate is conferred, is not found in either of those acts. That in cases of settlements or agreements for the separate estate of *feme coverts*, the law requires certain language to accomplish such a purpose, and authorities have been adduced to show the law in relation to that question. It is true that in deeds or agreements such is necessary, and in their absence, courts will not be permitted to impair the marital rights of the husband by a departure from those established rules. But when the legislature has indicated its will, no matter in what language, the court must yield implicit obedience to its authority. The legislature has determined that the land shall be held in the name and as the property of the wife. In cases of agreements, and when technical or sufficient language is not used, no such design can be accomplished. But when the law-makers have declared their intention, that intent must govern. If they have said such can be done and must be so, it is not in the power of the court to inquire why they have dispensed with the intervention of a trustee, or why they have not used the technical language found in the elementary books of the law on such subjects. I repeat, it is enough for the court to see the intention of the legislature, however expressed, and obey its requirements. It is a settled principle in the construction of statutes, that the intention is to prevail, and the circumstances which produced it is to be considered and not form is to control. *Young vs. The State*, 7 *G. & J.*, 253. *Beall vs. Harwood*, 2 *H. & J.*, 167."

From this decision, and judgment in conformity therewith, the defendant appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, J.

Thomas Harbine for the appellant, argued:

1st. That by the well known rule of the common law, the rents of lands belonging to *femes covert* are the property of their husbands, and liable to be taken in execution for their debts. 2 *Kent*, 129, 130. 1 *Roper on Husband & Wife*, 35.

2nd. That by no act of Assembly of Maryland has the com-

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mon law rule been so much changed as to take away from the husband the rents and profits of the wife's real estate and make them her separate property. First, let us examine the act of 1841, ch. 161. Being in derogation of the common law, this act must be strictly construed. 8 *Gill*, 129, *Miller vs. Stewart*. 1 *Kent*, 464. *Dwarris on Statutes*, 695. Courts will not indulge in speculation to arrive at the intent of the legislature. *Dwarris*, 703, 708. Words of common use must be taken in their ordinary signification and import. 1 *Kent*, 462, and *note*. 2 *Barn. & Ald.*, 522, *King vs. Inhabitants of Turvey*. *Dwarris*, 702. The ordinary signification of the words "real estate" is land, and that does not include rent. 1 *Crabb on Real Property*, 66. Real estate is distinguished from personalty by its manner of devolving, and as the wheat in controversy was severed and threshed, it would clearly pass to the personal representatives and not to the heir at law. 1 *Crabb*, 4. 2 *Kent*, 131, 340, *note (a.)* 3 *Do.*, 402. *Comyn's Digest, (A,)* 2, *(G,)* 1. 1 *Wms. on Exc'rs*, 397, 698. 1 *Crabb*, 6, 11. This construction of that act would not avoid any beneficial operation of it, but would relieve the homestead from execution, which was the design of the law.

Nor has the husband been deprived of his right to the rents of his wife's land by the act of 1842, ch. 293. The words, "any married woman may become seized of real property, &c., in her own name and as of her own property," do not confer upon her a separate estate in lands thus devised and give her the rents and profits. To give the wife a separate estate, it must be done in clear terms; not by inference but by language—it must clearly appear beyond any reasonable doubt. 2 *Story's Eq., secs.* 1381, 1382, 1383. *Hill on Trustees*, 421. 4 *Maddox*, 409, *Wills vs. Sayers*. 2 *Russell & Mylne*, 183, *Tyler vs. Lake*. 2 *Mylne & Keene*, 184, *Kensington vs. Dollond*. 1 *Ch. C.*, 194, *Dakins vs. Berisford*. 3 *G. & J.*, 508, *Carroll vs. Lee*. 6 *Md. Rep.*, 383, *Turton vs. Turto* . Every part of a statute will be considered in its construction. 6 *H. & J.*, 382, *Mayor & City Council of Balto. vs. Moore, et al.* The same property is, by the first section of this act, given to the wife in slaves as in real property, but that it gives no separate property is manifest, else the third section would

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not give a separate property in slaves. The first section merely empowers a married woman *at law* to hold her *separate* property without the intervention of a trustee, which she could not do before. 2 *Story's Eq., sec.* 1378. 2 *Crabb*, 1749.

In reply to the appellee's second point, that McGill rented the farm, as agent for his wife, and she, by virtue of the agreement with the tenant to pay the rents to her, would be entitled to them, we contend:—1st. That it does not appear from the facts in this case that the rents were to be paid to the wife; and 2nd, that by the common law, the rents were the husband's, (2 *Kent*, 129, 130,) and McGill could not, as against his creditors, *give them to her*, so as to authorise her to receive them from the tenant. 2 *Bland*, 561, *Helms vs. Franciscus*. 2 *Kent*, 129, and *note (b.)* 2 *Blackstone's Com.*, 422, and *note* 39. 3 *Am. Law Register*, 231, *Avery vs. Duane*. 3 *Atk.*, 72, *Beard vs. Beard*. 2 *Md. Ch. Dec.*, 360, *George vs. Spencer*. 2 *Story's Eq., secs.* 1374, 1375. The appellees' authorities on this point do not apply to husband and wife, nor can the act of 1853, ch. 245, protect what the wife could not acquire.

On the appellee's third point, that until delivery of the rental proportion, the whole crop remains in the tenant, and therefore the landlord had nothing to levy upon, see 8 *Johns.*, 117, *Bradish vs. Schenck*. 3 *Do.*, 221, *Foote vs. Colvin;* but such is not the law of Maryland. 4 *Gill*, 209, *Ferrall vs. Kent*.

To the appellees' fourth point, that the rental proportion not being delivered, the right to it was a mere *chose in action*, not subject to execution, we reply, that though not delivered, yet it appears from the facts in the record that it was separated from the lessee's part of the crop, threshed and ready for delivery, and *only that part which was the landlord's was levied upon*, and hence it was subject to execution. 1 *H. & G.*, 308, *McElderry vs. Flannagan*.

Richard H. Alvey for the appellees, argued:

1st. That on a fair and liberal construction of the act of 1841, ch. 161, together with the act of 1842, ch. 293, these acts being intended as exemption laws, for the protection of

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married women against the extravagance, prodigality and dissipation of their husbands, the property levied upon, under the facts of this case, was not liable for execution for the satisfaction of the debts of the husband during the life of the wife. That upon the true construction of these acts, the legislature intended to confer benefit and protection upon the wife, and to further and effect that object, these acts should receive a liberal and beneficial construction, even though such construction be without the apparent letter of the statute. 4 *G. & J.*, 152, *Canal Co. vs. Rail Road Co.* 11 *Coke*, 73, *Magdalen College case.* 6 *Bac. Abr.*, 384. *Plow.*, 205, *Stradling vs. Morgan.* 1 *Kent*, 462 to 464. 4 *Md. Rep.*, 1, *Cassilly, et al., vs. Meyer, et al.* 11 *G. & J.*, 490, *Lucas vs. The Lottery Commissioners.* 12 *Do.*, 1, *Lucas vs. McBlair, et al.* 7 *Md. Rep.*, 76, *Gibbs vs. Gale.*

2nd. But suppose it should be thought that the property levied on under the facts of this case was not within or comprehended by the acts of 1841 and 1842, yet under the facts of this case the wife could have a right to the rents reserved, it being agreed that the land was rented for and in the name of the wife, and though the wife would not take the rental proportion of the grain technically as rent, she would be entitled to it by virtue of the contract with the tenant. And on a formal state of pleading under the facts of this case, the wife, being the meritorious cause of the action, would be entitled to sue with her husband on the contract with the tenant. 3 *Cruise Digest, tit., Rent*, 78, 319, 320. 1 *Hilliard on Real Property*, 242. 5 *Watts*, 134, *Ege vs. Ege.* 1 *H. & G.*, 139, *Higdon vs. Thomas.* 1 *H. & G.*, 484, *Owings vs. Owings.* 1 *Chitty's Pl.*, 26. 1 *Story's Eq., sec.* 336. And under the act of 1853, ch. 245, all the rights or property acquired by the wife in this case, by virtue of the contract with the tenant, are protected from the debts of the husband and are not in any way liable to execution for such debts.

3rd. Where the rent reserved is a proportion of the crop, the whole property in such productions remains in the lessee till it is divided and the lessor's share *delivered* to him. 1 *Hilliard on Real Property, tit., Rent, ch.* 16, *sec.* 4, *page* 236. 9

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Johns., 113, *Stewart vs. Doughty.* 5 *Watts & Sergt.*, 157, *Rinehart vs. Olwine.* 1 *G. & J.*, 266, *Hoskins vs. Rhodes.*

4th. The rental proportion not having been delivered before the levy of the execution, the right, at most, was but a mere *chose in action*, which is not subject to execution. 6 *H. & J.*, 266, *Harding vs. Stevenson.*

LE GRAND, C. J., delivered the opinion of this court.

This is an appeal from the decision of the circuit court of Washington county on a case stated. The facts which it is necessary to notice are these:—certain parties obtained a judgment before a justice of the peace against the defendant, Charles McGill, and caused to be issued thereon a *fieri facias*, which was delivered to the appellant, as constable, for levy, which was accordingly done on a certain quantity of wheat alleged to be part of the yield and rent of a farm which had been devised to the wife of the said McGill. The farm was rented or leased by the said McGill, "for his wife, to a certain William Peter, who was tenant in possession, and who seeded on the said farm, as tenant as aforesaid, in the fall of the year 1853, a crop of wheat, and harvested or gathered the same in the summer of 1854, and that the said quantity of wheat so seized and levied upon as aforesaid, to satisfy the execution against the said McGill, was part of the rental proportion of the said crop of wheat so sown and gathered, which the said tenant, Peter, was to pay as rent for the said farm." The words of the devise are as follows: "I give and devise to my daughter, Mary McGill, and her heirs and assigns forever," &c.

The question is, whether, under the laws of Maryland, the crop or rent of the farm devised to Mrs. McGill be liable to execution for the debts due by her husband?

The act of 1841, ch. 161, provides, "that no real estate hereafter acquired by marriage shall be liable to execution, during the life of the wife, for debts due from her husband." And the first section of the act of 1842, ch. 293, declares, "that from and after the passage of this act, any married woman may become seized or possessed of any property real, or of

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slaves, by *direct bequest, demise, gift, purchase* or *distribution*, in her own name and as of her own property; provided the same does not come from her husband after coverture."

We consider this case must be decided by the act of 1841; the section of the act of 1842 was designed to authorise a wife to acquire title to any property real, and *slaves*, in the particular modes therein pointed out, without the intervention of a trustee. The act of 1841 was intended to shield any real estate acquired by marriage from execution, during the life of the wife, for debts due by the husband. Although it does not destroy the tenancy by the curtesy, it nevertheless suspends the right of execution during the life of the wife, leaving, however, the judgment lien perfect on the life estate of the husband, to be enforced on the death of the wife. *Anderson, et al., vs. Tydings, et al., Ante.*, 427.

Whatever may be thought of the wisdom of such legislation, it is clear to our apprehension, that it was the purpose of the legislature to secure to the wife and husband the enjoyment of her real estate during her life. To allow the rent or yield of the property to be taken in execution for the debts of the husband, would be, in effect, to render the law in most cases wholly inoperative. Concurring with the court below, we accordingly affirm the judgment.

Judgment affirmed.

Isaac Pusey *vs.* The Potomac Bridge Company.

Materials for building a bridge, delivered by the contractor at the place designated by the bridge company, accepted and paid for by them in pursuance of the contract under which the bridge was to be built, are, upon the abandonment of the work by the contractor, (which contingency was provided for in the contract,) the *absolute property* of the company, and are not liable to attachment by the creditors of the contractor.

Appeal from the Circuit Court for Frederick county.

Attachment, sued out by the appellant, on the 2nd of May

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1853, against the lands, tenements, goods, chattels and credits of Abraham Bowers, a non-resident debtor, and on the same day laid upon a lot of pine and hemlock timber in the hands of the Potomac Bridge Company. The account on which the attachment issued amounted to $1164.74, and the property attached was appraised at $2654, and by agreement of counsel was sold, under order of the court, by the sheriff, who had the proceeds of sale, to wit, the sum of $1505, in his hands ready for condemnation. The bridge company appeared as claimant of part of the goods so attached, and filed a plea to that effect, upon which issue was joined. It was agreed, that all the other property levied on, except that claimed by the bridge company, had been condemned for the use of prior attaching creditors.

1*st Exception.* The bridge company, the claimant, offered in evidence its charter, and a written contract between them and Bowers, dated the 11th of September 1850, the execution and delivery of which was proved, for building a bridge across the Potomac river, at the Point of Rocks. The terms of this contract necessary to be stated are:—1st, that Bowers was to build the bridge according to specifications annexed to the contract, and "to furnish all the materials" necessary therefor, according to the specifications, of such quality as the engineer of the company may approve. 2nd, during the progress of the work, the engineer was to make monthly estimates of the work done, "and of all suitable materials procured for the bridge" by Bowers "and delivered by him on the ground of the company, or at such place or places as may be designated for the purpose by the engineer of the company," four-fifths of which estimates were to be paid by the company and the remaining fifth retained until the work was completed, when a final estimate was to be made and the balance paid; and these estimates were to be conclusive between the parties. 3rd, Bowers was to commence the work within thirty days from the date of the contract, give his personal attention to its execution, conduct it under the supervision and control of the engineer, and complete it by the 1st of December 1851; and in case he should fail to commence or complete it within said times, or if

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he should "disobey any of the written orders of the engineer or shall violate any of the express conditions of this agreement, then, on a certificate of the fact by the engineer," the company "may declare this contract abandoned, and the said company shall thereupon be exonerated from every obligation thence arising, and the reserved per centage on the work done and materials previously estimated, as well as all materials furnished and work performed on which no estimate or payment may have been made, shall be forfeited to and become the right and property of the said bridge company," and they may then agree with any other person to complete the work. By the proposal to build the bridge, Bowers agreed that all damage done to the work by high water, or in any other manner during the construction of the work, should be at his risk.

It was then proved, that the timber in question was furnished by Bowers under this contract, and delivered partly upon the land of Chesapeake and Ohio Canal Company and in part upon the land of Mr. Smith; that the place of delivery was designated with the concurrence of the engineer, the land of the canal company being used with his consent, as agent of that company, and that of Smith under an agreement between him and Bowers; that it was embraced in the monthly estimates and paid for by the bridge company; that after the estimates were made, it was considered the property of the bridge company placed under the control of Bowers, as agent of the company, for him to put such work upon it as would enable him to comply with his contract, and he had no further control or custody of it than is usual in all such cases on public works. Bowers continued the work under the contract until the 21st or 22nd of April 1853, when he abandoned the work and absconded. The fact of this absconding was certified to the company by the engineer, on the 26th of April 1853, by letter, recommending the abandonment of the contract, which recommendation was adopted by the company, by a resolution passed at a meeting of the president and directors of the company on the day following. The property in question remained at the place of delivery up to the time of Bowers' absconding, and until levied on by the attachment in this case. On the part of

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the attaching creditor, Pusey, it was proved, that at the times of making the estimates and payments he was a *bona fide* creditor of Bowers, without actual notice of the claim of property by the bridge company other than that derived since the levy of the attachment. The claimant then asked the following instructions to the jury:

1st. If they find the execution of the contract, the delivery of the materials in controversy by Bowers, in pursuance thereof, at places designated or concurred in by the engineer, that they were embraced in the estimates and paid for by the company prior to the absconding of Bowers, and prior to the issuing and levy of the attachment in this case, then the property in said materials vested in the bridge company, and the claimant is entitled to recover them.

2nd. If, in addition to the facts in the preceding prayer, the jury find that Bowers abandoned the work prior to the issuing and levying the attachment in this case, and left the materials in question at the places designated or concurred in by the engineer, and that they were purchased to be used in the construction of the bridge, and were embraced in the estimates and paid for by the company prior to the absconding of Bowers and the issue and levy of the attachment in this case, then the title thereto vested in the bridge company, and that the attaching creditor is not entitled to condemnation thereof.

The court (NELSON, J.) granted both these prayers, and to this ruling the plaintiff excepted.

2nd Exception. The plaintiff then asked instructions, embracing the following propositions of law:

1st. That the right of property in the materials did not pass to the company so as to defeat the right of the attaching creditor acquired by the levy, because they had not been applied to the construction of the bridge, and their application yet remained under the contract subject to the approval or rejection of the engineer, and therefore something yet remained to be done by Bowers in and upon said materials.

2nd, 3rd and 4th. That there was no sufficient sale or transfer of possession of the materials from Bowers to the company as against the *bona fide* creditors of Bowers, but that the pre-

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tended sale thereof was fraudulent and void as against such creditors, the materials having been furnished by Bowers and having remained in his actual and visible possession and control after the estimates and payments made thereon by the bridge company.

5th. That no right of property in the materials vested in the company as against the *bona fide* creditors of Bowers, under the provisions of the contract relating to the abandonment of the work, even if Bowers did so abandon it.

6th. That there was no sufficient declaration of the abandonment by the company of the contract with Bowers, in conformity with the provisions thereof, so as to vest a right of property in the materials in the company as against the plaintiff, a *bona fide* creditor of Bowers.

7th. That the company is not entitled to recover if the property was seized, under the writ of attachment, prior to any declaration of abandonment by the company of the contract, as provided for therein.

8th. That upon the pleadings and evidence in the cause the company is not entitled to recover, because the estimates and payments made, as provided for in the contract, are not sufficient to prove a right of property in the materials in question in the company as against a *bona fide* creditor of Bowers, and because there has been no sufficient declaration of abandonment of the contract by the company, as provided for therein.

The court rejected each and all of these prayers, and to this ruling the plaintiff excepted, and the verdict and judgment being in favor of the company, appealed.

The cause was argued before ECCLESTON, TUCK and MASON, J.

J. Shaaff Stockett and *R. T. Merrick* for the appellant, argued:

1st. That the contract between Bowers and the bridge company, was a contract for the construction of a bridge by Bowers out of materials procured by and belonging to him, and not for the sale and delivery of such materials; and that under

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such a contract, no title to any materials being used in building such a structure could pass to the company so long as any work remained to be done upon them by Bowers, or so long as they remained subject to the future approval or rejection of the company by the terms of the contract, but that the title thereto remained in Bowers until all work contracted to be done on these materials was completed, and until they were made part of the structure being erected. *Chitty on Cont.*, 378. 1 *Taunt.*, 318, *Mucklow vs. Mangles.* 4 *Mees. & Wels.*, 686, *Tripp vs. Armitage.* 6 *Taunt.*, 322, *Cotterell vs. Apsey.* 11 *Mees. & Wels.*, 248, *Clark vs. Bulmer.* 3 *New Hamp.*, 382, *Davis vs. Hill.* 16 *Pick.*, 30. 9 *Gill*, 294, *Rodemer vs. Hazlehurst & Co.*

2nd. That there was no sufficient transfer of the possession of these materials, but that the pretended sale of them was fraudulent and void as against the *bona fide* creditors of Bowers. 7 *Term Rep.*, 67, *Manton vs. Moore.* 4 *Adol. & Ellis*, 448, *Clarke vs. Spence.* 4 *Mees. & Wels.*, 686, *Tripp vs. Armitage.* The possession required to be given to pass a valid title as against creditors must be a *substantial, bona fide and exclusive possession. Chitty on Cont.*, 414. 1 *Esp.*, 205, *Paget vs. Perchard.* 1 *Camp.*, 333, *Wordall vs. Smith.* 5 *Verm.*, 231, *Judd vs. Langdon.* 2 *Aik.*, 64, *Weeks vs. Mead.* 2 *Kent*, 518. 7 *G. & J.*, 417, *Franklin, et al., vs. Long.* Possession must not only be *substantial, bona fide and exclusive*, but it must be a *continuing* possession. 8 *Verm.*, 356, *Morris vs. Hyde.* 2 *Whart.*, 302, *Streeper vs. Eckart.* 2 *Watts & Sergt.*, 147, *Young vs. McClure.* 6 *Do.*, 94, *McBride vs. McClelland.* 1 *Smith's Lead. Cases*, 1, 65. Such is the rule of law upon this subject as pronounced in England and this country, requiring that the possession transferred in order to pass a valid title as against creditors shall be a *substantial, bona fide, exclusive and continuing* possession, and that fraud is a necessary inference from the fact of the vendor's remaining in possession. The security given to creditors by this rule, and the protection it afforded to the public against fraud and imposition from secret sales, was not deemed sufficient in this State. By the act of 1729, ch. 8, it is enacted,

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that no goods or chattels whereof the donor shall *remain in possession* shall pass, alter or change, or any property therein be transferred to any purchaser, mortgagor or donor, unless the same be in writing, duly acknowledged and recorded. Under this act fraud is not an inference from the fact of possession, but remaining in possession is itself declared to be fraudulent, and made by express enactment to defeat the passing of any property in the goods attempted to be sold, *unless* notice is given of such sale by the public records. The act having then provided a means by which a transfer of title may be effected and sufficient notice given, though the vendor remain in possession, it has relieved the question as to the character of the possession to be deemed a sufficient transfer of property, from all embarrassment, and made it imperative that the vendor should adopt the mode of transfer it has prescribed, unless he transfers to the vendee such *substantial, entire and exclusive* possession and control as will make manifest, beyond doubt, the change of title.

3rd. That the provision in the contract as to the abandonment thereof by the bridge company, and the passing of the property to the company upon the contingencies therein mentioned, was a mortgage or pledge of the property, giving to the company an inchoate right therein or a conditional lien thereon from the date of the contract, and therefore within the provisions of the act of 1729, ch. 8.

4th. That the declaration of abandonment by the bridge company was not a sufficient declaration of abandonment under the contract.

Bradley T. Johnson and *Joseph M. Palmer* for the appellee, argued, that the rulings of the court below were correct:

1st. Because the contract between the bridge company and Bowers was a good and binding contract in law, and is fully proved to have been executed and delivered, and is *divisible* in its character. 11 *Wheat.*, 237 to 261, *Perkins vs. Hart.* 14 *Wend.*, 257, *Sickels vs. Pattison.* 9 *Gill*, 294, *Rodemer vs. Hazlehurst & Co.*

2nd. Because the materials, or goods and chattels *in dispute*.

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and which were levied on by the appellant, were furnished by Bowers under his contract with the bridge company, and were delivered by him at the place or places designated for such delivery by the engineer of the company, or at the places which were concurred in by the engineer and the company, and had been estimated and paid for, as required by the contract, long before the issuing or levy of the attachment of the appellant, by which delivery, estimate and payment, the goods legally passed to the appellee, as between the contracting parties *and all other persons whatever*, and were not liable to be attached by the appellant. Manucaption delivery is not necessary in all cases. Where goods are not susceptible of manucaption delivery constructive delivery is good. 2 *Kent*, 500. 1 *East*, 194, *Chaplin vs. Rogers*. 7 *G. & J.*, 407, *Franklin, et al., vs. Long*. 4 *Gill*, 270, *Van Brunt vs. Pike & Ward*. 12 *Mass.*, 300, *Jewett vs. Warren*. 7 *Term Rep.*, 67, *Manton vs. Moore*. 6 *Md. Rep.*, 10, *Atwell vs. Miller & Mayhew*. The delivery in this case is not obnoxious to the statute of 13 *Eliz., ch.* 5. 3 *Coke*, 80, *Twyne's case*. 2 *Term Rep.*, 587, *Edwards vs. Harben*. *Prec. in Ch.*, 285, *Bucknal vs. Roiston*. *Coup.*, 432, *Cadogan vs. Kennet*. 2 *Bos. & Pull.*, 59, *Kidd vs. Rawlinson*. 10 *Ves.*, 145, *Lady Arundell vs. Phipps*. 1 *Maule & Selw.*, 251, *Leonard vs. Baker*. 4 *Taunt.*, 823, *Watkins vs. Birch*. 7 *Do.*, 149, *Benton vs. Thornhill*. 1 *Ryan & Moody*, 312, *Eastwood vs. Brown*. 4 *Barn. & Cres.*, 652, *Latimer vs. Batson*. 3 *Kent*, 517, 518, 519. 1 *Powell on Mortgages*, 39. 3 *Cranch*, 73, *United States vs. Hooe*. 4 *Wheat.*, 503, *Wheaton vs. Sexton*. 1 *Pet.*, 449, *Conrad vs. Atlantic Ins. Co.* 15 *Mass.*, 244, *Brooks vs. Powers*. 2 *New Hamp.*, 13, *Haven vs. Low*. 3 *Do.*, 415, *Coburn vs. Pickering*. 8 *Cowen*, 406, *Seward vs. Jackson*. 7 *Wend.*, 436, *Jackson vs. Timmerman*. 1 *Pick.*, 288, *Bartlett vs. Williams*. 2 *Do.*, 607. 3 *Do.*, 255, *Wheeler vs. Train*. 7 *Do.*, 56, *Shumway vs. Rutter*. 8 *Do.*, 443, *Shumway vs. Rutter*. 43 *Law Lib.*, 35 to 60. The tendency of American authorities is stated in 1 *Powell on Mortgages, Am. notes*, 34. See also 7 *Term Rep.*, 67, *Manton vs. Moore*. Nor is the delivery in this case obnoxious to the

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statute of Maryland of 1729, ch. 8, sec. 5. 1 *H. & J.*, 3, *Garrett vs. Hughlett*. 3 *Do.*, 499, *Bruce vs. Smith*. 2 *H. & G.*, 415, *Hudson vs. Warner & Vance*. 1 *Md. Rep.*, 519, *Bryan vs. Hawthorne*.

3rd. Because Bowers did not prosecute his work to completion without intermission according to contract, but abandoned his work and contract, leaving the bridge in an incomplete state before the issuing and levy of the attachment of the appellant, and also leaving the goods and chattels upon which the attachment was levied at the places which had been designated for their delivery, and which had been paid for before the attachment issued; and because the company had lawfully declared the contract abandoned before the issuing and levy of the appellant's attachment, by which abandonment of Bowers and declaration of abandonment of the company, the materials delivered, work done, and reserved *per centage*, were forfeited and became the property of the company. 9 *Gill*, 289, *Rodemer vs. Hazlehurst*. 8 *G. & J.*, 420, *Clary vs. Frayer*.

MASON, J., delivered the opinion of this court.

We are of opinion that the materials which were the subject of the present attachment, having been delivered upon the company's ground, or such other place as was designated by their agent, accepted and paid for by the company in pursuance of the agreement, upon the work having been abandoned by Bowers, (a contingency provided for in the contract,) they became absolutely the property of the company. Under such circumstances it cannot be successfully contended that "the vendor, mortgagor or donor, remained in possession" of those materials, so far as to defeat the title of the company, or "to procure to himself credit" in the community, so as to contravene the act of 1729, ch. 8.

Judgment affirmed.

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WILLIAM E. MAYHEW *vs.* RICH'D S. HARDESTY.

The mortgagee of a term, after forfeiture, has the whole legal estate therein, and is liable on the *real covenants* in the lease whether he becomes possessed of or occupies the premises *in fact* or not.

To make a party liable under the covenants as assignee, he must be the assignee of the *entire term*, for otherwise he is but a mere *sub-lessee*, and as such not liable under the covenants.

An interest in a term for more than seven years cannot be transferred or assigned, except in the mode prescribed by our registry laws, and no acts *in pais* short of a deed, duly executed and recorded, can transfer such interest.

A bond of conveyance executed by a lessee to a purchaser of the lease, does not make such purchaser the *legal assignee* of the *entire term*, and he is not therefore liable under the covenants in the lease.

A covenant to keep insured a *factory*, necessarily embraces the obligation to keep the fixed machinery, necessary to the operation of the factory, insured, among which would be included the water-wheel, shafting and gearing; the term "*factory*" embraces such fixed machinery.

APPEAL from the Court of Common Pleas of Baltimore city.

Assumpsit by the appellant against the appellee to recover the amount paid by the plaintiff as premiums for certain policies of insurance. Plea, *non assumpsit*.

Exception. The facts of the case appearing by the record are briefly these: Capron and wife, by deed dated the 26th of December 1845, leased to Heath and Snowden, for ninety-nine years, renewable forever, two undivided thirds of certain lands, including certain water privileges appertaining to a factory about to be erected thereon, for the yearly rent of $900. This lease contained a covenant between the lessees, "their heirs, executors and administrators," and the lessor, "his heirs and assigns," that the lessees, "their executors, administrators or assigns" should, during the continuance of the term, "at their own proper cost and charge, insure or cause to be insured, and kept insured from loss or damage by fire, the factories and buildings erected or that may be erected" on the demised premises, in some insurance offices in the city of Baltimore; and should assign, to and for the use of the lessor, two undivided thirds of all the right and interest of the lessors or their executors, administrators or assigns, in each and every such policy of insurance, and shall pay the lessor, his heirs

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and assigns, or permit him or them to collect two-thirds of the money received on such policies to pay the rent, or by the permission of the lessor, his heirs or assigns, to apply the money to rebuilding or repairing such buildings as may be destroyed or injured by fire under the policies; and in case of default of the lessees to keep up the insurance or to assign the policies as aforesaid, then the lessor, "his heirs or assigns, may effect insurance thereon for his or their use at the expense of the" lessees, "their executors, administrators or assigns." On the same day the lessees mortgaged to the lessor, to secure the punctual payment of the rent reserved in the above lease, all the machinery and fixtures then in or intended to be placed in the factory in course of erection on the demised premises.

On the 6th of May 1846, and the 13th of January 1849, the lessor conveyed by two deeds, (one moiety by each,) the property in question, subject to the lease above stated, and the mortgaged machinery and fixtures, to Mayhew, the plaintiff, for $10,000. On the 12th of September 1849, the *Avondale Manufacturing Company* having acquired by *mesne* assignment all the interest of the lessees, Heath and Snowden, in the lease and demised property, mortgaged the same, with other property, to Hardesty, the defendant, to secure the payment of certain notes mentioned in the mortgage, the mortgagor covenanting to keep insured the buildings, machinery and fixtures, and until default in payment in the notes as they became due the mortgagor was to remain in possession of the property, but in case of failure to pay the same as they respectively fell due the mortgagee was to enter and possess the property. None of the notes mentioned in the above mortgage were paid at the time this suit was brought, though most of them had long since become due.

In July 1850, Hardesty sold to Mason all his estate and interest in the property mortgaged to him, and Mason, by the authority and consent of Hardesty, then took possession of the same and has since continued to hold it, and has ever since regularly paid to Mayhew the ground-rent reserved by the original lease. The arrears of ground-rent, due at the time of this purchase, was paid by Hardesty to Mayhew out of the

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purchase money paid by Mason. On the 14th of November 1850, Hardesty executed a bond of conveyance to Mason for the property sold, reciting the terms of the purchase, in which, among other things, it was stipulated that Mason should keep the factory and machinery insured until the payment of all the purchase money, and that the equity of redemption of the Avondale Manufacturing Company in the property had been conveyed to Hardesty by deed dated the 14th of November 1850. It was proved, that at the time of the original lease there were no buildings upon the land except two small houses; that the cotton factory, which was put in operation early in 1846 or 1847, cost, exclusive of machinery, between $8000 and $10,000; and the cost of the movable machinery was from $12,000 to $15,000; that what is called fixed machinery includes the water-wheel, shafting and gearing; that there were two water-wheels of iron to the factory, which cost originally about $450 or $500; that in one of these wheels some alteration was made, which cost less than $400; that the other fixed machinery might have cost $500 or $1000.

It was admitted that neither the original lessees nor Hardesty had done anything in performance of the covenant for insurance in the original lease, between the 13th of October 1850 and the 4th of November 1852. The plaintiff, Mayhew, insured in the Etna Insurance Company on the 14th of October 1850, for one year, to the amount of $5000, viz., $2500 on the movable machinery in this factory, and $2500 on the building, paying therefor as premium $100; also in the Franklin Fire Insurance Company of Philadelphia, on the 4th of November 1850, for one year, to the amount of $5000 on the "cotton mill and water-wheel," paying $100 premium; and also in the Etna Insurance Company on the 14th of October 1851, for one year, to the amount of $5000, viz., $2200 on the building and $2800 "on the fixed machinery, including water-wheel, shafting, gearing," &c., paying $100 premium. The property mentioned in these policies was on the demised premises at the time the policies were effected. On these facts the plaintiff asked the following instructions to the jury:

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1st. That the plaintiff, as assignee of the reversion in the property described in the lease from Capron to Heath and Snowden, is entitled to recover the premiums or sum or sums of money paid by plaintiff to procure the insurance effected by the policies given in evidence upon all the property described in those policies, except the property described as movable machinery in the policy of the 14th of October 1850; if they find that the said property was on the demised premises at the respective dates of said policies, and find that none of the notes described in the mortgage to Hardesty, given in evidence, have been paid, notwithstanding that said Hardesty had not possession of said mortgaged premises at the time when said premiums were paid or when some of them were paid.

2nd. That if they find the facts stated in the plaintiff's first prayer, that then the plaintiff is entitled to recover the premiums or proportion of premiums paid for insurances effected on all the property described in all said policies, inclusive of the water-wheel but excepting the property described as "movable machinery" and that described as "shafting, gearings," &c., although said Hardesty had not possession of said mortgaged premises when said premiums were paid.

3rd. That if they find the facts stated in the plaintiff's first prayer, that then the plaintiff is entitled to recover the premiums or a due proportion of the premiums for effecting insurances effected on all the property described in all said policies, excepting the movable machinery, the water-wheel and shafting and gearing, although said Hardesty had not possession of said mortgaged premises when said premiums were paid.

4th. If the jury find the facts stated in the first prayer, and that Hardesty, in July 1850, contracted with Mason to sell all his estate and interest in the mortgaged premises, and to execute, at some future day, a deed therefor to Mason, upon certain conditions, to be performed according to the form and effect of the bond of conveyance, dated the 14th of November 1850, and given in evidence, and that at the time of making this contract Hardesty agreed and stipulated, that Mason should or might take actual possession of and use the premises from and after the time of making this contract, and that in pursu-

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ance of this contract and agreement, Mason did take actual possession of the mortgaged premises from and after the time of making the contract, and has continued ever since to hold possession thereof, that then Hardesty is to be considered in this action as a mortgagee in possession from and after the time of this contract; and then the plaintiff is entitled to recover the premiums paid by him to procure the insurance effected by the policies given in evidence upon all the property described in those policies, except the property described as "movable machinery" in the policy of the 14th of October 1850, if they find that none of the notes described in the mortgage to Hardesty, given in evidence, have been paid, and if they find that said policies were all effected after the date of the contract between Hardesty and Mason.

5th. If the jury find the facts stated in the first and fourth prayers, then the plaintiff is entitled to recover a due proportion of the premiums paid for effecting insurances on all the property described in all said policies, inclusive of the water-wheel, but excepting the movable machinery and that described as shafting and gearing.

6th. If they find the facts stated in the first and fourth prayers, then the plaintiff is entitled to recover the premiums, or a due proportion of the premiums, paid for effecting insurances on all the property described in all said policies, excepting the movable machinery, the water-wheel, shafting and gearing..

The court (MARSHALL, J.) rejected each and all of these prayers, and to this ruling the plaintiff excepted; and the verdict and judgment being against him, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, J.

Edward O. Hinkley for the appellant, argued:

1st. That a covenant to insure runs with the land and binds assignees, and the covenant in the present case expressly includes them. 6 *G. & J.*, 381, *Thomas vs. Vonkapff.* The appellee is mortgagee of the tenant, and as such is assignee in

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law and is liable, *even though not in possession*, for default had been made, none of the notes secured by the mortgage having been paid, and the first of them having become due in March 1850, long before insurance was effected, and the mortgagee then having the right to possession both by law and by the express terms of the mortgage. 4 *Kent*, 145. 1 *Brod. & Bing.*, 238, *Williams vs. Bosanquet*. 4 *Leigh*, 69, *Farmers Bank vs. Mutual Assurance Society*. 15 *Verm.*, 489, *Pingry vs. Watkins*, and the same case in 17 *Verm.* The very point has been decided by this court in *Hintze vs. Thomas*, 7 *Md. Rep.*, 346.

But most clearly the appellee is liable if in possession, and his *acts are equivalent to taking possession*, for he sold to Mason, who immediately took possession, in July 1850; that is, before the insurance was effected: and afterwards, on the 14th of November 1850, the *equity of redemption* was conveyed to the mortgagee, as appears by his reference to that fact in his bond of conveyance to Mason.

2nd. As to the extent of the appellee's liability: The word *factories* includes the fixed machinery; that is, the water-wheel and the shafting and gearing, for it is proved by a competent witness, that "what is called fixed machinery includes the water-wheel, shafting and gearing," and the language of one of the policies is, "on the fixed machinery, viz., the water-wheel, shafting, gearing," &c., showing clearly the opinion of the insurance company, that those things were fixed machinery, and showing their intention to hold themselves liable therefor. It is to be observed, that the appellant did not claim for any movable machinery: all his prayers expressly exclude that. Now does the word *factory* embrace *fixed machinery*? Most clearly it does, for the reason that without machinery the buildings are not *factories*, and the language of the covenant is particular, "buildings *and factories*." It is also to be observed, that the mortgage to the appellee expressly includes the machinery and fixtures as well as the land, and so does the bond of conveyance from the appellee to Mason. But even independently of the word *factories*, the covenant to insure the *buildings* would include *fixtures*, because they would

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pass by a conveyance of the land, and so would be covered by a covenant running with the land. 11 *Barbour*, 43, 62, 64, *Buckley vs. Buckley*. 3 *Md. Ch. Dec.*, 186, *McKim & Kennedy vs. Mason*, and cases there cited. 1 *Ohio State Rep.*, 528, *Teaff vs. Hewitt*.

F. K. Howard and *S. T. Wallis* for the appellee.

The plaintiff below offered six prayers, all of which were rejected. From that rejection alone the appeal is taken. The *onus* is therefore on the appellant to show that at least one of his prayers should have been granted, in the identical shape in which it was presented. This court cannot go behind the prayers to look for merits, of fact or law, which the appellant's case may be supposed to possess, but which the prayers either do not embody, or embody in a connexion which it would have been error to adopt. The action of the court below must be judged by the prayers which were before it, and not by propositions, which might have been, but were not.

Of the six prayers, the first, second and third assert that Hardesty, as mortgagee, is responsible on the covenant to insure, though he may never have been in possession. The fourth, fifth and sixth assert, that by his contract with Mason, and Mason's possession thereunder, Hardesty, in contemplation of law, was actually in possession and so responsible on the covenant. Let us first assume, for the sake of argument, that the two sets of prayers are not otherwise defective or erroneous than in the two propositions which they thus principally set up, viz:

1st. That the mortgagee of a term, out of possession, is liable for covenants running with the land; and 2d. That the possession of a purchaser under a bond of conveyance is the possession of the vendor, so as to make the latter liable for such covenants, as an assignee in possession.

1st. It is respectfully submitted, that some overruling legal necessity alone will induce this court to fix on a mortgagee, out of possession, a responsibility for his mortgagor's covenants. It is common learning, that if the lessee sub-lets, by way of mortgage or otherwise, reserving a reversion of but a single

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day, the sub-lessee is free from the covenants. He is not an assignee, in name, though he is in fact. The twenty four hours save him. An assignee, it is conceded law, may assign to a pauper, avowedly to get rid of the covenants, and the pauper's responsibility at law, (though he has none in fact,) discharges the liability of his assignor. Surely there cannot be any peculiar sanctity in a rule of responsibility, which may be legitimately reduced to a practical absurdity by such simple processes. Surely a liability which is so purely nominal, that it attaches to a man merely when you call him an "assignee," and ceases to bind him as soon as you call him something else, though he in fact remains the same, cannot depend upon any vital principle of policy or jurisprudence. It must belong to that class of doctrines which the authorities denounce, when they say that "to stick at the letter is to stick in the bark"—*qui hæret in litera hæret in cortice.*

But, even if the doctrine has any thing sound in it, as applied to absolute assignees—owners of the term—it certainly has not, in its application to mortgagees, who, as every body knows, are not owners of the term in fact, no matter how strenuously you may endeavor to prove them so by definitions. Courts of law, in the progress of civilization, have at last grown to regard mortgages as what they are—securities and nothing more. You need not go into equity now to learn that a security for a debt is not a landed estate—that it is a mere collateral to the debt which it secures. The courts have at last acknowledged consciousness of the fact, that an estate in land, which may be extinguished by the payment of a promissory note, and amounts to nothing till the note is due and unpaid, is not of much higher dignity than the promissory note itself. Thus, happily, men's rights and reason are no longer smothered under old scholastic phrases, and the securities of a commercial community have ceased, in a measure, to be regulated by the statute of "*Quia Emptores.*"

In Maryland our legislation has been in aid of this progress of ideas. A mortgage in fee-simple is no longer any thing, in fact, but a chattel interest with us. By the acts of 1833, ch. 181, and 1839, ch. 26, the interest in the land devolves,

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with the debt, on the executor, whose release is made equivalent to a reconveyance by the heirs.

Nor have our courts been at all behind the legislature, in relieving us, on this point, from the fictions of feudal pedantry. An outstanding mortgage, if paid in fact, cannot be set up in ejectment against the mortgagor, though it may not have been paid till after forfeiture. (*Morgan vs. Davis*, 2 *H. & McH.*, 9.) Nor can a mortgagee, who has been paid, but who still retains the legal title, recover in ejectment against the mortgagor's assignee. (*Paxon vs. Paul*, 3 *H. & McH.*, 399.) In the former of these cases the court decides, in terms, what is, in substance, necessarily determined in them both, that by payment "the mortgage was discharged, and *the estate of the mortgagee defeated, in law and equity*," though the legal title was still outstanding in him. One would think that after this there should be an end to all superstition about the empty shell of the mortgagor's "legal estate." The late Court of Appeals indeed expressly determined, further, that the mortgagor is regarded in law, as in equity, as the substantial owner, until foreclosure, his estate being, at law, responsible for his debts under attachment or execution. (*Ford vs. Philpot*, 5 *H. & J.*, 312. *Dougherty vs. McColgan*, 6 *G. & J.*. 285.) This court itself, pursuing the same enlightened course of decision, has determined, (*Georges Creek Coal & Iron Co. vs. Detmold*, 1 *Md. Rep.*, 237,) that a covenant in a mortgage, for the mortgagee to hold until default, is equivalent to a re-demise from the mortgagee, and revests the legal estate in the mortgagor, so as to enable him to maintain ejectment.

With what show of consistency then, in view of these decisions and our statutes, can the appellant ask this court to say, that a mortgagee of a term, not in possession—not enjoying the profits—a mere holder of an unappropriated security—is, by virtue of his having the naked "legal estate" in him, an assignee of the whole term, and bound by the covenants of the lease? That he is not the owner of the term in equity, (which means simply that he is not in fact,) is conceded. It is his being clothed with the "legal estate" which alone creates his liability. But if a mortgagee in fee, though clothed

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with the nominal legal estate, does not pass it to his heirs; if the legal estate of a satisfied mortgagee, though still a legal estate, will not maintain or defeat an ejectment, which is a mere matter of legal estate; if a mere covenant for possession, till default, which, on the strictest principles, is perfectly consistent with the existence of a present legal estate in the mortgagee, is yet construed to be a re-demise, and to render the actual legal estate of the mortgagee no legal estate at all for the time being; whence shall come the sanctity which is sought to be attached to the mere legal estate here? It is the same mortgage—the same legal estate—the same policy—the same principle—throughout. Why then set up the shadow in the one isolated case, when you regard the substance, only, in all the others? Why adhere to one incident only of the legal estate, when you repudiate all the rest? Why make the solitary exception in a case, where you admit that the rule is a technical and verbal one only, by conceding that the trick of a sub-lease or an assignment to a pauper may demolish it altogether? It is no answer to say that this is a case at law, and that the constructions and doctrines of equity have nothing to do with it. Not one of the decisions referred to can stand upon that theory. Every one of them involves the absolute subordination of the mortgagee's legal title at law, to the broad and liberal application of the principles of equity. Uphold the doctrine contended for here, and you reverse them all—establishing in the stead of the rational principles which they embody, the singular doctrine, that a mortgage, which is meant for a security to a creditor, is but a mode of entrapping securities for the lessor of the debtor. It can only be done, it is respectfully submitted, by ignoring utterly the nature of a mortgage, as understood and expounded in modern days, and going back to the times when Glanvil and Skene expatiated *de mortuo vadio*.

The case of *Eaton vs. Jacques*, 2 *Douglas*, 456, in which Lord Mansfield repudiated the liability of a mortgagee out of possession, upon the covenants in the lease, would be conclusive from its reasoning if not from the authority of the great judge who pronounced it and the able associates who con-

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curred with him in it. In spite of the case of *Williams vs. Bosanquet*, by which it has been overruled in England, it has not ceased to command the support of the most eminent authorities in this country.

Astor vs. Miller, 2 *Paige*, 68. *Astor vs. Hoyt*, 5 *Wendell*, 603. *Walton vs. Crouly*, 14 *Wendell*, 63. *Wittington vs. Sale*, 7 *Mass.*, 139. *Cushing vs. Hurd*, 4 *Pick.*, 253. *Cooper vs. Davis*, 15 *Conn.*, 560. *Wilkins vs. French*, 20 *Maine*, 117. *Smith vs. Taylor*, 9 *Alab.*, 637. And see *Greenleaf's Cruise, title* 15, *secs.* 15, 16, *p.* 111.

The Supreme Court of the United States, in *Calvert vs. Bradley*, 16 *Howard*, 580, has left no doubt of its determination to adopt the doctrine of Lord Mansfield whenever the case shall arise.

It is the conceded doctrine already, in all our courts, in regard to the liability of mortgagees of ships for repairs done while the mortgagors remain in possession, and it seems impossible to draw a distinction, in principle, between those cases and cases like the present; the liability in both being sought to be affixed to the legal title, and that title in both being a matter of record, independent of possession.

Nor is there any foundation for the argument, that this court itself has held differently in the case of *Hintze vs. Thomas*, 7 *Md. Rep.*, 346. That cause was heard and determined on a case stated, and it is part of the statement itself, that upon the forfeiture of the mortgage, "*by the terms thereof*, Hintze became *the absolute assignee at law*." The court therefore was bound, according to its own repeated decisions, to adhere to the case stated, and it consequently treated Hintze as "absolute assignee" throughout. The obligations of mortgagees, whether in or out of possession, were not discussed by the counsel, (as reported,) nor considered by the court. The word "mortgage" does not occur once in the whole opinion, nor are mortgagees once alluded to.

It is, of course, obvious, that in the case of an absolute assignment, (as in *Hintze vs. Thomas*,) it makes no difference whether the assignee does or does not take possession. He is the absolute representative in responsibility of the original

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covenantor. But as a mortgagee, even after forfeiture, is, under our decisions, only owner *sub modo*, with qualified rights; he is only, *sub modo*, exposed to responsibility. The possession, which clothes him with the profits of the term, thus becomes an indispensable item among the considerations which are to fix its burdens on him.

It is therefore a palpable *non sequitur* to argue, that because an absolute assignee has been held liable, (in *Hintze vs. Thomas*,) without possession, an assignee, by way of mortgage and out of possession, has the same liability. The law may be so, but that case does not decide it, and the argument to the contrary merely begs the whole question by assuming the identity, *quoad hoc*, of mortgagees and absolute assignees, which is precisely the matter in dispute.

So much for the first three prayers, so far as their main principle is concerned.

2nd. Is it true, as is asserted by the last three prayers, that Mason's possession was Hardesty's?

One of the interest notes secured became due to Hardesty on December 15th, 1849. He, however, never took possession, but, on July 8th, 1850, contracted to sell the property to Mason, who immediately took possession under the contract, having paid part of the purchase-money and given notes for the rest. On November 14th, 1850, Hardesty, for the first time, received a deed of the Avondale Factory's equity of redemption, and he, on that day, *uno flatu*, executed a bond of conveyance to Mason, conditioned to convey, on payment of the notes given in July 1850. Mayhew himself was, however, assignee of a mortgage of the leasehold interest in the machinery and fixtures of older date than Hardesty's mortgage, nay of the same date with the original lease, viz., December 26th, 1845, so that Hardesty, so far as the machinery and fixtures were concerned, never had the legal estate at all in the term. His legal estate in the term, as to the buildings, he passed away the moment he acquired it, and he never had any actual possession. With a part of Mason's purchase-money he paid the arrears of ground-rent before Mason took possession in July 1850, and from that time forth, Mason,

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being in possession under the bond of conveyance and in his own right, regularly paid the ground-rent to Mayhew, who as regularly received it from him.

Can such a possession be called the possession of Hardesty? If it cannot the last three prayers were properly rejected, even supposing them to be erroneous in no other particular.

This is not a question, as supposed in the argument, as to whether Mason was, at law, the assignee of Hardesty's whole interest. Upon the most rudimental principles, he, of course, was not.

But still there is no analogy between his case and that of a sub-lessee. Hardesty retained no reversion. Mason was the assignee in equity of the whole beneficial interest, subject, of course, to the terms of the bond of conveyance, and the question is, whether being thus, in fact, in possession, in his own right, he was, in law, in possession in Hardesty's, merely because he had not the technical legal estate in him? There seems to be a very simple mode of testing the matter.

In a case fairly raising the question, could there be any doubt that Mason's possession was adverse to Hardesty? Obviously not. It was a possession by Mason as purchaser, not as tenant, in his own right, and in that of no one else. It would have given a legal title, of itself, if continued long enough. How then could it be adverse and not adverse at the same time? How could it be Mason's possession and Hardesty's likewise, when the one was directly antagonistic to the other and irreconcileable with it?

The possession of a purchaser, under an unrecorded deed, is so far notice to all the world as to avail, under our statutes, against every one but a *bona fide* purchaser for value by deed recorded. (1831, *ch.* 304.)

So possession under a bond of conveyance will carry the legal title, under a decree in equity, against intermediate judgment creditors, (*Alexander vs. Ghiselin*, 5 *Gill*, 181,) the registry laws to the contrary notwithstanding. Where then can this court find authority for treating such a possession as nothing at all? It is no answer to say that Mason could not be sued at law as assignee, and therefore the right of action

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must remain against Hardesty. In the very case of *Hintze vs. Thomas*, 7 *Md. Rep.*, 351, this court has itself determined, that assignees may be liable in equity for breaches of covenant, and can there be any doubt that Mason, in possession in his own right, under an equitable title, might have been made liable in equity if not at law? Even at law, could not Mason have been estopped from denying that privity of estate which sustains the remedy against an assignee after he had taken possession in his own right and paid rent under the lease?

3rd. But the prayers could not have been properly granted, even if the appellant's view of the preceding propositions be correct.

The 2nd, 3rd, 5th and 6th prayers are erroneous, because uncertain and inconsistent in their terms and alternatives. They instruct the jury to give "the premiums *or* proportion of premiums paid;" "the premiums *or* a due proportion of the premiums paid," and "*due proportions* of the premiums paid." The plaintiff, if entitled to recover at all, was entitled to the whole premiums paid or to a portion of them. It was for the court to say whether he should have the whole or a part, and if a part it was for the court to determine what part. The court would have manifestly erred in leaving it to the jury to give the whole or a part, in their discretion, and to determine, if they gave a proportion, what proportion was the "due" one.

The 1st and 4th prayers are clearly defective in asserting the appellant's right to recover the whole premiums paid "for insurance on all the property," when the covenant, in terms, only provided for the insurance of a two-thirds interest.

The 1st, 2nd, 4th and 5th prayers are further erroneous, because they assume the right of Mayhew to insure the "machinery and fixtures" at Hardesty's expense. The covenant is to insure the "factories and buildings" only to the extent of a two-thirds interest. There were no "factories" on the land at the time, and all the machinery and fixtures in existence were at another place. These fixtures and machinery were, by deed of even date with the lease which contains the covenant, mortgaged to the lessors as a security for the rent,

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together with all other machinery and fixtures which might thereafter be put up, &c. That mortgage of machinery and and fixtures has been assigned to Mayhew, the present appellant. Now one of two things is clear: Either the machinery and fixtures are mere chattels, or they are attached to and pass as part of the realty. If they are mere chattels it seems impossible to determine that they are covered by a covenant to insure "buildings and factories," or that such a covenant runs, as to the chattels, with the land. If they are attached to the realty then Mr. Mayhew is assignee of a mortgage of part of the leasehold premises, and must, upon the appellant's own doctrine, be liable under the identical covenant here sued on; he being, *quoad hoc*, in precisely the same relation to the lease that Hardesty occupies, with the additional difficulty of being a prior mortgagee. In either case the prayers referred to must be bad. In the one, supposing the fixtures, &c., to be chattels, Mr. Mayhew is estopped from asking that he be allowed to insure them as "buildings" at Hardesty's expense. In the other, if they are an interest in land Mayhew is clearly precluded from fixing on Hardesty, as the prayers require, the duty to insure the whole, for the insurance of part of which he is, himself, on his own doctrine, bound. As mortgagee of the leasehold interest in the machinery and fixtures he cannot escape from the obligation to keep them insured, if there be anything at all in the theory of his own case; and being so obliged he had no right to ask, and the court would have erred in instructing the jury, that Hardesty was liable for the whole. At the most Hardesty could only have been liable for the proportion which the value of the buildings might bear to the machinery and fixtures, and the prayers were erroneous in ignoring this. The same error, in fact, pervades and vitiates all the prayers.

4th. There is a still further and fatal objection to all the prayers, which is, that assuming Hardesty to be assignee of the term, and liable as such, in virtue of his privity of estate, they overlook the conclusive fact that Hardesty was only mortgagee of an equity of redemption and not of a legal estate. Besides the interest in the machinery and fixtures, which

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Mayhew holds under the first mortgage of all, Capron had a mortgage of the legal estate of the term. It is true he joined in the mortgage to Hardesty, but, distinctly, not for the purpose of abandoning his estate. It was only to waive his priority of payment.

It will be further observed, that all the prayers treat Hardesty as mortgagee. None of them advert to the deed of the 14th of November 1850, by which the Avondale Factory passed its equity of redemption to him. Indeed none of them require the jury to find the execution of even the original lease or the mortgage to Hardesty. They all assume and take, distinctly, from the jury these fundamental facts of the case. It is respectfully submitted, that not one of the prayers can be indicated which was not properly rejected under this court's repeated decisions, on that ground if on no other.

MASON, J., delivered the opinion of this court.

The principal questions raised upon this appeal are:—first, whether the appellee, Hardesty, as mortgagee of the term, notwithstanding he never took possession of the premises, is liable under the real covenants of the assignor? secondly, if he was, did not the sale and bond of conveyance to Mason, accompanied with possession, so far amount to a legal transfer of all his interest, as to make Mason, and not himself, liable under the covenants? and thirdly, if not liable as mortgagee out of possession, or if there has not been a complete transfer of all interest to Mason, so as to make him liable, will not the possession of Mason, under the peculiar circumstances of the case, be regarded as that of Hardesty, so as to make him mortgagee constructively in possession?

In settling the first two questions, we need not look to the English authorities nor to those of our sister States, as we think the decisions of our own Court of Appeals have settled both. The third question, therefore, becomes unimportant.

By a close inspection of the case of *Hintze vs. Thomas*, 7 *Md. Rep.*, 346, it will be found that the principle is clearly recognised, that where a party takes an assignment of a lease, as in the present case, the whole legal estate passes, and he

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thereby becomes liable on the real covenants, whether he became possessed, or occupied the premises, in fact, or not.

This is also now the law in England, notwithstanding the earlier decision of *Eaton vs. Jacques, Doug.*, 455, to the contrary. *Williams vs. Bosanquet*, 1 *Brod. & Bing.*, 230, 5 *Eng. Com. Law Rep.*, 72. The same rule prevails at least in some of our sister States. *Pingrey vs. Watkins*, 15 *Verm. Rep.*, 679.

But it is contended by the appellee's counsel, as his second ground of defence, that even if he had been liable, by mere force of the mortgage, to him, and without possession, such liability was divested by the sale and bond of conveyance of his interest to Mason, and the possession of the latter thereunder.

This is not a correct legal assumption. Unless Hardesty transferred to Mason his *entire* interest or term, the latter would not thereby be an assignee, but a mere sub-lessee, and as such not liable under the covenants. The case of *Peter vs. Schley*, 3 *Har. & Johns.*, 211, determines, that such an entire interest as is ascribed to Mason, that is, an interest for more than seven years, cannot, under our registry laws, be transferred or assigned in any other way than that prescribed by those laws, and that no acts, *in pais*, short of a deed duly executed and recorded, are competent for that purpose, (act of 1766, ch. 14.) Mason, therefore, cannot be regarded as the legal assignee of Hardesty's entire interest, and is not on that account liable to the appellant.

We are also of the opinion, that the term "*factories*" embraces the fixed machinery necessary to operate the factories, and the reason is, that without such necessary machinery, the buildings would not in fact be factories. A building is no more a factory without machinery, than machinery would be a factory without a building. A covenant, therefore, to keep insured a *factory*, necessarily embraces the obligation to keep the machinery necessary for the operation of the factory also insured: among such necessary fixed machinery would be included the water-wheel, shafting and gearing.

In the main, we think the theories of the appellant's first

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three prayers are correct, but we do not deem it necessary to affirm all the legal propositions advanced by each of those prayers. The last three prayers, which rest upon the notion that Mason's possession should be treated as the possession of Hardesty, need not be passed upon in the view we have already taken of the case.

We reverse the judgment, in order that the Court of Common Pleas, upon another trial, may instruct the jury in accordance with the principles herein announced.

Judgment reversed and procedendo awarded.

JACOB STOKELEY *vs.* WILLIAM J. M. GORDON, and ANNA MARIA GORDON, his wife's Lessee.

A testatrix devised a house and lot to "*Anna Maria German, wife of Jonathan German.*" Anna Maria was not the wife but the *daughter* of Jonathan German, and his wife was named *Catharine*. The daughter and wife both claimed the devise. HELD:

Per Mason, J., That parol testimony was inadmissible to show, whether the testatrix intended to devise the property to the *daughter* or the *wife;* that the question was one of construction from the *face of the will*, and the *wife* was entitled to the devise.

Per Tuck, J., That the devise was void, for *uncertainty;* and that the property descends to the heir at law as if the party had died intestate.

Per Eccleston, J., That upon a proper construction of the will, in connection with such evidence as was legally applicable to the case, the *daughter* is entitled to the property.

APPEAL from the Superior Court of Baltimore city.

Ejectment by the appellees against the appellant for a house and lot in the city of Baltimore. Plea, *non cul.*

1*st Exception.* The property in question belonged to Mrs. Ann Craig, who died in August 1843, leaving a will, executed on the 10th of May 1843, by which she devised the house and lot, now in controversy, "*unto Anna Maria German, (wife of Jonathan German,)* to her, the said *Anna Maria German*, her heirs and assigns, in fee-simple." The will, also, contains a bequest of railroad stock, and another of specific arti-

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cles of silver to "*Anna Maria German, (wife of Jonathan German.*") It was admitted that Anna Maria German was born on the 27th of November 1829, and was the *daughter*, not wife, of Jonathan German, and that she intermarried with William J. M. Gordon after the death of Mrs. Ann Craig, and before the institution of this suit. It was also admitted that the wife of Jonathan German was named *Catharine* German, and that Jonathan German died after Mrs. Ann Craig. (The plaintiffs in this suit are, Gordon and wife, claiming in right of his wife, who was Anna Maria German, the daughter of Jonathan German; and the defendant Stokely, is the tenant of Catharine German the wife of Jonathan German.)

The plaintiffs then offered a competent witness, and proposed to prove by him that Anna Maria German, (now Gordon,) was the great niece of the testatrix, Mrs. Ann Craig; that her first name, Anna, was given to her after the testatrix; that the testatrix took her to live with her when a small child, about six or seven years of age, and that she lived with her from that time up to the death of the testatrix, a period of seven or eight years, and that the testatrix uniformly treated her with great affection; that she gave her her board, caused her to be educated at her own expense, and conducted her religious training and education; and that the testatrix was an aged widow who had never had children. To the admissibility of which testimony, and of all parol testimony to show or explain an ambiguity in the will of the testatrix, Ann Craig, the defendant objected, upon the ground that the devise of the property in suit is to and in favor of the wife of Jonathan German, and that the will is free from ambiguity. The court, (FRICK, J.,) overruled this objection and allowed the witness to be sworn on the part of the plaintiffs. To this ruling the defendant excepted.

2nd Exception. The plaintiffs then proceeded to offer evidence to the jury, the admission of which it was agreed should not be held an abandonment by defendant of the question of law and objection raised in the first exception. The plaintiffs then, in addition to the evidence set forth in the first exception, proved by witnesses, substantially, as follows:

Miss Linthicum testified that she knew Jonathan German,

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and his wife Mrs. Catharine German, who was familiarly called Kitty; that she knew Mrs. Ann Craig, and Anna Maria German the daughter of Jonathan and Catharine German, who was called Anna after Mrs. Craig, and was a great-niece of Mrs. Craig; that Mrs. Craig had a brother and some sisters, but never had any children, and was a widow twenty years or more previous to her death, on the 28th of August 1843; that Anna Maria was living with Mrs. Craig in August 1836, being then very small, and continued to live with her from that time till her death; Mrs. Craig was very kind to Anna Maria, though witness does not think she was treated as an adopted child. Isabella Stansbury, another great-niece of Mrs. Craig, was also taken to live with her, and did live with her till her death. Mrs. Craig gave them their board, and said she educated them, and that she occasionally gave them presents. Witness heard Mrs. Craig say she intended giving the piano to Anna Maria German, and a silver cake basket or baskets, and the rest of her silver to Mary Ann Craggs; and also heard her say, that if Anna Maria German behaved herself she would not forget her when she died. Anna Maria always went with Mrs. Craig to the Baptist church, (her family were Episcopalians,) and was sent to the Baptist sunday school by Mrs. Craig. Witness thinks Anna Maria slept in the same bed with Mrs. Craig, and accompanied her to the springs in 1843, shortly before Mrs. Craig's death, being then about fourteen years of age.

Mrs. Trott was slightly acquainted with Mrs. Ann Craig; saw her at Jonathan German's house, and heard her say, in the midst of the family, and in the presence of Anna Maria German, that if Anna Maria would be a good girl, and mind her, she would never want for any thing at her death: this was a year before Mrs. Craig's death.

Benjamin German, a brother of Jonathan German, deceased, proved that Mrs. Craig had been a widow twenty years, and had never had children; that she had a brother who had several children, and a sister, and that Mrs. Catharine German was the daughter of a deceased sister; that Mrs. Craig lived with Jonathan German for some years, and until Anna Maria German was from five to seven years old, when she went to her own house and took Anna Maria with her.

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That she manifested as much devotion to Anna Maria as if she was her own child; that she went with her to church, and assumed her religious training and education. Also, that Mrs. German and Mrs. Craig were upon affectionate terms, and that the former visited Mrs. Craig frequently; that Mrs. German, when a child, and going to school, staid part of her time with Mrs. Craig, and part with her uncle; that Jonathan and Catharine German had other children besides Anna Maria, but all of them except one, a son, were small, and were not very often at Mrs. Craig's.

Miss Blatchley was, for five or six years, intimate with Mrs. Craig, and visited her often; that Mrs. Craig took Anna Maria as her own daughter, and told witness that she so considered her; that she was very fond and affectionate to her, and had the religious training and education of her; that Mrs. Craig often told witness she intended to leave Anna Maria enough to live on; that she intended to leave her a house in York or East Baltimore street, a watch and chain, a silver basket, and a piano; that she said this frequently; that this was about two or three years before her death.

John Hanan, offered on the part of the defendant, testified, that he was sent for to go to the house of Jonathan German to draw the will of Mrs. Craig; that he went to her room, and asked her to give him the bequests; that she did so and he put them down rough, and then read them to her slowly, and asked if it was right? and she said it was; that he then took the papers home, and drew the will from the memoranda he had made; that he took it the next day to Mrs. Craig and read it to her, and asked her if it was what she wanted? and she replied that it was; he then sent for witnesses and caused it to be executed, and handed it to her; that he was always under the impression that Mrs. German's name was Anna Maria, and thought she was named after Mrs. Craig; that he inserted the words, "wife of Jonathan German," after the name, that there might be no mistake about the person intended. He has no recollection that the name, Anna Maria, was mentioned; that he put it down of his own accord, and then read it to her; that Mrs. Craig was in good health at the time, which was three or four months before she died.

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On cross-examination this witness stated, that he took down the names of devisees from Mrs. Craig's lips; that he varied from the plan, because he thought Mrs. German was intended; that he took the names, and put down the relations of his own caution. He thought Mrs. German's name was Anna Maria; that he wrote the words, "Ann Maria German, (wife of Jonathan German,)" in the rough draft; that he put the word "wife," himself, and that Mrs. Craig did not tell him.

The defendant then prayed the court to instruct the jury, that if they should believe that the testatrix, Ann Craig, executed the will given in evidence, and all the other testimony given in the case, then notwithstanding all the parol testimony, and notwithstanding the jury shall believe the christian name of Jonathan German's wife is Catharine and not Anna Maria, and that Anna Maria is the christian name of said Jonathan's daughter, and that she was in being, and so named, at the date of the will of the testatrix, and that she is now Anna Maria Gordon, and the wife of William J. M. Gordon, and was married to said Gordon after the death of the testatrix, the plaintiff is not entitled to recover, the true construction of said will being, notwithstanding the error in the said wife's christian name, to pass to the wife of said Jonathan German, the property in the several devises and bequests therein set forth, as made to "Anna Maria German, wife of Jonathan German." This instruction the court refused to give, and to this ruling the defendant excepted. The verdict and judgment were in favor of the plaintiffs, and the defendant appealed.

The cause was argued before Eccleston, Tuck and Mason, J.

Charles F. Mayer for the appellant, argued:

1st. That although it is admitted that Anna Maria is not the christian name of Mrs. German, yet that the effect of the dispositions in the will is to make the "wife of Jonathan German" the devisee and legatee; and that *only one who fulfilled that relation and answered that description can* take under the will the particular property now in dispute; and that therefore no case of latent ambiguity is presented which authorises

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any parol testimony, or is required, for determining the testatrix's intent; and that that is emphatically true, as there can be but *one* person, as the wife, pointed to; just as (in the position in *Coke Litt.*, 3. *a*,) where a grant is made to Robert, Earl of Pembroke, avails, although the earl's name is not Robert, but *Henry*. In designation of parties who are to take interests, or are in the view of stipulations, the particular relation or capacity mentioned, *for the purpose of identifying them, is imperative* as one of the terms of designation, and is much *more* to be regarded than the *name*, as the relation or capacity is *more surely and obviously to be known and considered* than is a name. Who can doubt, that if the devise had been "*to the wife of Jonathan German, Anna Maria German*," or "*named Anna Maria*," the construction must have been that the "*wife*" alone is meant? How does the present phraseology differ from that thus supposed? *Anna Maria* is used, and *to obviate chances of error and make the meaning certain*, the identification, as "the wife of Jonathan German," is superadded. The parenthesis for the words "wife of Jonathan German," indicates that pointedly. It is so the law appreciates this definition of the party meant to be benefited, and explains the occasion and purpose of it: *De nomine proprio non est currandum quum in substantia non erretur.* 6 *Coke*, 66. *Branch's Principia*, 38. *Fonb. Eq.*, 427, *book* 1, *ch.* 6, *sec.* 11. 1 *Greenlf. on Ev.*, *secs.* 299, 287, 289, 301, 290. 10 *Johns.*, 137, *Jackson vs. Stanley.* 3 *Ves.*, 321, *Campbell vs. French.* 4 *Do.*, 680, *Price vs. Page.* 6 *Do.*, 42, *Smith vs. Coney.* 19 *Do.*, 382, *Stockdale vs. Bushby.* *Hobart*, 170, 171, *Stukeley vs. Butler.* 5 *Mees. & Wels.*, 363, *Hiscocks vs. Hiscocks.* 2 *Younge & Collyer*, 72, *Bradshaw vs. Bradshaw.* 11 *Simons*, 467, *Blundell vs. Gladstone.* 9 *Eng. Law & Eq. Rep.*, 269, *Adams vs. Jones.* 11 *Do.*, 191, *The General Lying-in Hospital vs. Knight.* 21 *Do.*, 66, *In re. Rickit's Trust.* 23 *Do.*, 207, *Bernasconi vs. Atkinson.* *Ibid.*, 239, *Douglas vs. Fellows.* 5 *Md. Rep.*, 304, *Walston vs. White.* 7 *Do.*, 22, *Douglas vs. Blackford.*

2nd. *Description* is said to be inferior, as means of designation, to *name*, when appended to the name and when *false*.

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But that principle does not govern where there is *truth* in the description as being applicable to another person, and where, under that description, this other person may claim. This relative grade of description is marked by the maxim of "*falsa demonstratio non nocet*," and no other position than this maxim is meant by it. It is applied only where the *named party* "is certain;" that is, is *certainly* the person meant. Such is the language of the doctrine. As, suppose, a devise "*to my brother A, Judge in Calcutta*," when although the brother is truly named A, yet he is not a *judge* nor resides in *Calcutta*. There the description yields as a *falsity*, and the name prevails. *Broom's Legal Maxims*, 269 to 274. 6 *Term Rep.*, 671, *Thomas vs. Thomas*. 1 *Lord Raymond*, 304, *King vs. Bishop of Chester*. 1 *Greenlf. on Ev., sec.* 301. *Fonb.*, 427. 2 *Kent*, 271.

3rd. Latent ambiguity arises, and parol evidence is admissible, only where *extra* the instrument more than one are shown to exist, answering the description or designation of the party named as for the benefit of the instrument, or where two or more parties are shown fulfilling each in part the description annexed to the name. The cases of 3 *Barn. & Ald.*, 632, *Le Chevelier vs. Huthwaite*, and of 1 *Ed. Ch. Rep.*, 189, and 4 *Paige*, 272, *Smith vs. Smith*, are instances of the last branch of the position just advanced in regard to the latent ambiguity. In the first case the party named fulfilled the description as being *a son*, thought not *a second son*, as he was characterised, and he who was truly the second son was in competition with him, as within the testator's bounty. In the other case, (*Smith vs. Smith,*) the party named fulfilled, as being *a wife*, the annexed description in part, but did not, *in name*, correspond to the testator's words. If Anna Maria had been *a wife at all*, and (as "*German*" is affixed to "*Anna Maria*,") a wife of one *German*, *not* a *Jonathan*, *then* a case of latent ambiguity would have arisen and such a case as is exhibited in the two authorities just adverted to, relied on by the appellees. These cases, however, disprove one position of our adversaries; that is, that the *name* is to prevail over all descriptions, as preeminently signifying the person in view of the tes-

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tator. Were that so, why was not *Mary Smith* declared legatee, without the introduction of parol proof to test the testator's meaning between her and *Sarah*, in *Smith vs. Smith*? And in *LeChevelier vs. Huthwaite*, why was not Stokeham Huthwaite construed the devisee, without making his claim *dependent on parol proof* for *explaining the testator's intent*? 8 *Bing.*, 244, *Miller vs. Travers.* 1 *Greenlf. on Ev., sec.* 299. 5 *Mees. & Wels.*, 363, *Hiscocks vs. Hiscocks.* 23 *Eng. Law & Eq. Rep.*, 239, *Douglas vs. Fellows.*

John H. Handy and *Levin Gale* for the appellees, argued:

1st. That it being shown by the parol evidence that Anna Maria German was the daughter of Jonathan German, and that Jonathan German's wife was named Catharine, a latent ambiguity is shown, and that parol testimony is admissible to aid in the construction of the will, *particularly evidence of the situation and condition of the testatrix, and the relationship and intimacy existing between her and the person claiming the devise, which was the substance of the evidence excepted to.* The cases of *Smith vs. Smith*, 1 *Edw. Ch. Rep.*, 189, affirmed on appeal in 4 *Paige*, 272, and *Doe on Demise of LeChevelier vs. Huthwaite*, 3 *Barn. & Ald.*, 632, are almost identical in their circumstances with this case, and in both cases parol evidence was held admissible. The general rule on the subject is announced in the case of *Miller vs. Travers*, 8 *Bing.*, 244, and was adopted by the Supreme Court in *Atkinson's Lessee vs. Cummins*, 9 *How.*, 479. Parol evidence was also held admissible in the following cases, and in many others too numerous to cite: 8 *Iredell*, 39, *Eringhaus vs. Cartwright.* 1 *Iredell's Eq. Rep.*, 11, *Simpson vs. King.* 15 *Conn.*, 274, *Brewster vs. McCall's Devisees.* 4 *Johns. Ch. Rep.*, 607, *Thomas vs. Stevens.* 1 *Paige*, 291, *Connolly vs. Pardon.* 2 *Dana*, 47, *Tudor vs. Terrel.* 1 *Ves., Jr.*, 266, *Parsons vs. Parsons.* *Ambler*, 175, *Dowset vs. Sweet.* 19 *Ves.*, 601, *Careless vs. Careless.* 10 *Leigh*, 199, *Mound's Adm'r vs. McPhail.* 1 *Wend.*, 541, *Doe vs. Roe.* 1 *B. Monroe*, 111, *Haydon vs. Ewing's Devisees.* 1 *H. & J.*, 192, *Dorsey vs. Hammond.* 3 *Watts*, 385, *Vernor vs. Henry.*

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12 *Penn. State Rep.*, 136, *Brownfield vs. Brownfield.* 2 *Mees. & Wels.*, 129, *Gord vs. Needs.* 12 *Adol. & Ellis*, 451, *Allen vs. Allen.* 4 *Ves.*, 680, *Price vs. Page.* 1 *Wm. Black.*, 60, *Jones vs. Newman.* 4 *Md. Rep.*, 506, *Marshall vs. Haney.* 5 *Do.*, 303, *Walston vs. White.* 7 *Do.*, 22, *Douglas vs. Blackford.* 1 *House of Lord's Cases*, 778, *Lord Camoys vs. Blundell*, and the same case in 11 *Simons*, 467, 6 *Term Rep.*, 671, *Thomas vs. Thomas.* 2 *Younge & Collyer*, 72, *Bradshaw vs. Bradshaw.* 23 *Eng. Law & Eq. Rep.*, 207, *Bernasconi vs. Atkinson.* *Ibid.*, 238, *Douglas vs. Fellows.* There is no case in England or in this country which has dared to question a single point decided in *Miller vs. Travers;* but on the contrary, that case has been affirmed by every court in which the question has been raised.

2nd. That if the will is free from ambiguity, and either the name or the designation is to be preferred, that the name is entitled to the preference, and that therefore Catharine German, the wife, is not entitled before Anna Maria, the daughter, who bears the name. On this point, see *Bacon's Maxims of the Law, rule* 25: "*Presentia corporis tollet errorem nominis et veritas nominis tollet errorem demonstrationis.*" Under which rule Lord Bacon says: "*There be three degrees of certainty:* 1st. *Presence.* 2nd. *Name.* 3rd. *Demonstration.*" And again: "*The proper name of every one is in certainty worthiest; next are such appellations as are fixed to his person, or at least of continuance, as "son of such a man," "wife of such a husband," &c.* See also 1 *House of Lord's Cases*, 778, *Lord Camoys vs. Blundell.*

Mason, J., delivered the following opinion:

In what cases, and to what extent, parol testimony is admissible to explain ambiguities in wills, or to ascertain the intention of the testator *dehors* the will itself, are questions, the determination of which has ever been attended with the greatest difficulty. To this class of questions does the one presented upon this appeal belong.

On the trial below it was admitted that Mrs. Craig, the testatrix, was seized of the real estate in controversy, and that

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by her will, duly executed, she devised the same "to Anna Maria German, wife of Jonathan German," and that Anna Maria was not in fact the wife, but the daughter of Jonathan German, but that his wife was named Catharine.

In this condition of the case the question arose, whether parol testimony was admissible to enable a jury to ascertain whether the testatrix intended to devise the property to the *daughter*, or the *wife*, or whether such parol evidence was to be excluded, and, from the will itself, arrive at the intention of the testatrix? Parol evidence was received, and the question of intention submitted to the jury, who found in favor of the daughter, and hence this appeal.

In all cases it is necessary, in construing wills, that the court should be placed, by parol evidence, in possession of all the surrounding facts and circumstances connected with the testator, and which tend to show his situation in his relations to the persons and things to which his devise may refer. Therefore it would have been proper in this case to have shown, if the fact had not been admitted, that the name and description of the devisee did not concur. Properly speaking this is not that kind of evidence which is intended to explain written instruments, but is proof necessary to enable the court to understand the situation of the testatrix, and thus reach the meaning and application of the words employed in the will. But the evidence which is sought here to be introduced, to show the intention of the testatrix, independent of the words of the will itself, and of such surrounding circumstances as have been alluded to, is a question of a very different nature. The inquiry then arises, in what cases extrinsic evidence of intention on the part of the testator is admissible: or, in other words, in what cases can ambiguities in written instruments be explained by parol proof?

Patent ambiguities are those which appear upon the face of the writing itself: as for example, a will with the name of the devisee left in blank. As a general rule such ambiguities cannot be explained, but if settled at all, must be from the face of the paper itself.

On the other hand a *latent ambiguity* is, where a writing is

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perfect and intelligible upon its face, but from some circumstance admitted in proof, a doubt arises as to the applicability of the language employed to a particular person or thing; but it is by no means an universal rule that general parol evidence is admissible to explain even latent ambiguities, or that such questions, in every instance, are questions of fact for the jury. The present case presents an example of a latent ambiguity.

Cases of latent ambiguity may be classed under three heads. The first is, when the description contained in a written instrument, of the person, thing or place intended, is applicable with equal certainty to each of several subjects, as a devise to "my cousin John," when the testator has two cousins John. In cases belonging to this class, and in none other, (it would seem from the later authorities,) is general parol evidence of the intention admissible, such as the declarations of the testator at the time and before executing the will, the nature and character of his intercourse and relations with the different parties, and things intended to be described, and the like. This principle, in the broad language in which we have laid it down, has been recognised in a number of cases, but the rule upon the subject is perhaps no where so well and fully defined, as in the recent case of *Hiscocks vs. Hiscocks*, 5 *Mees. & Wels.*, 363, by Lord Abinger. He says: "Now, there is but one case in which it appears to us that this sort of evidence (the testator's declarations, the instructions given for his will, and other circumstances of the like nature,) of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons, (each answering the words of the will,) the testator intended to express. Thus if the testator devise his manor of S to A, B, and has two manors of S," &c. "It appears to us, that in all other cases parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that the will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."

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In a still later case, (1853,) *Bernasconi vs. Atkinson*, 23 *Eng. Law & Eq. Rep.*, 207, the same principle is thus broadly announced: "Now, I think it is quite plain, upon looking through the authorities, that there is only one case in which any evidence can be introduced to show the intention of a testator, namely, where the description in the will is equally applicable to two different subject matters of devise, or to two different persons."

Again, in *Wigram on Wills*, (2 *Lib. of Law & Eq.*,) *Prop.* 7, *page* 101, it is said, "that courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, when the description in the will is insufficient for the purpose. These cases may be thus defined:—when the object of a testator's bounty, or the subject of disposition, (i. e., the person or thing intended,) is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

To this class of cases belong those of *Cheney*, 5 *Rep.*, 68; *Couden vs. Clerke*, *Hobart*, 32; *Jones vs. Newman*, 1 *Wm. Black*, 60; *Doe vs. Westlake*, 4 *Barn. & Ald.*, 57; *Fox vs. Collins*, 2 *Eden*, 107; *Brownfield vs. Brownfield*, 12 *Penn. State Rep.*, 136, and others. In all those cases general parol evidence was properly admitted, including the declarations of the testator, to show his intention, or explain his meaning. And the reason of the rule is obvious, and it is because it would be impossible to form any general, sensible rule of interpretation, by which courts could settle such questions from the face of the will itself, and they would remain undetermined, if parol proof of intention were not permitted to go to the jury. In the case of *Vernor vs. Henry*, 3 *Watts*, 393, Chief Justice Gibson says: "When the designation is by a name common to two or more, and without reference to circumstances of description, the question of identity is one purely of fact."

The second class of cases of ambiguity is, where the name, or description, or both, of the person or thing intended to be referred to, is in some respect so far incomplete or erroneous, as not to refer with precision to any particular person or thing,

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and therefore the defect or omission has to be supplied by implication, as, for example, a devise was to "Catharine Earnly," while no person of that name claimed the legacy, but one Gertrude Yardly did. *Beaumont vs. Fell*, 2 *Peere Wms.*, 140. The cases of *Thomas vs. Thomas*, 6 *Term Rep.*, 671; *Vansant vs. Roberts*, 3 *Md. Rep.*, 119, and others, are also examples of cases of this character. It may be added that out of such cases have arisen the greatest difficulties and conflict of authorities, as to whether such questions were to be determined by the court or by the jury, and to what extent, if at all, extrinsic evidence was admissible to ascertain the testator's intention. In many instances the same rule has been adopted as in cases falling under the first head, and the widest latitude has been allowed to the introduction of evidence to the jury, and the two English cases last cited are examples of the great extent to which courts have gone upon this point. We have referred to them, not as authorities, (for they have not been sustained by later cases,) but as illustrations merely of our meaning. The case also of *Camoys vs. Blundell*, 1 *House of Lords' Cases*, 778, is one of this class, and the same case is also reported in 11 *Simons*, 467, and is more fully referred to hereafter. In modern decisions much less latitude is allowed in the admission of testimony of intention than was warranted by the earlier cases, and, if what we have said upon the first head be correct, the practice of submitting such questions as those which belong to cases arising under our second head to the jury at all, and especially upon the declarations of the testator, and other similar evidence, is not warranted by sound general principles, or by cases of later adjudication. All such questions are questions of construction for the court, and must be determined from the face of the will itself, in connection only with such facts and circumstances as, in the language of Lord Coke, "stand well with the will."

In the case of *Blundell vs. Gladstone*, as reported in 11 *Simon*, 467, and which we have before said belongs to this class, the vice-chancellor says: "The sole question is, who was the person described as 'Edward Weld, of Lulworth, in the county of Dorset, Esquire?' That is the sole question,

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and for the purpose of determining it I shall only advert to the evidence which has been given, and very properly given, of the state of the Weld family, entirely rejecting from my consideration every thing else *dehors* the will, that can be at all said to bear upon what the testator's intention was. I look only at the facts of the case, namely, at those facts which show the state of the Weld family at the date of the will, and what the testator has said in his will." See also 5 *Pick.*, 512, and particularly the case of *Douglas vs. Fellows*, 23 *Eng. Law & Eq. Rep.*, 240. The case of *Vansant vs. Roberts*, 3 *Md. Rep.*, 119, was a case of this class, and there this court rejected parol evidence and decided the case from the face of the will, and the surrounding circumstances.

Then comes the third class of cases, as where the name used applies perfectly to one person or thing, while a description employed applies as perfectly to another. To this class belongs the case we are now considering. Such also were the cases of *Doe vs. Huthwaite*, 3 *Barn. & Ald.*, 632; *Smith vs. Smith*, 1 *Edwards Chan. Rep.*, 189; *Adams vs. Jones*, 9 *Eng. Law & Eq. Rep.*, 269; *Bradshaw vs. Bradshaw*, 2 *Younge & Col.*, 72; *Vernor vs. Henry*, 3 *Watts*, 385; *Douglas vs. Blackford*, 7 *Md. Rep.*, 8, and others.

The first matter to be determined, in a case like the present, is, whether the question is one of fact for the jury, or whether it is one of construction for the court? Upon principle it seems plain, that it must be one of construction, and should be settled by the court from the face of the will, in connection with the surrounding circumstances attending the transaction, although it is to be admitted, which it is to be regretted, that the authorities are very conflicting upon the subject, and any attempt to reconcile or harmonise them, would be a work of impossibility. In speaking of wills being the subjects of construction for the court, of course it is only meant to embrace such cases where the facts, which would be properly admissible in evidence, are admitted. In every instance when facts are denied, they must be found by the jury upon a hypothetical instruction from the court. Ch. J. Gibson, in *Vernor vs. Henry*, says, "that the ascertainment of intention from the will itself falls within the province of the court."

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Here it may be remarked, if the principle laid down under our first head, upon the authority of Lord Abinger and others, be correct, then the present case is not one for the jury, or for the admissibility of parol evidence, because it does not fall within the rule there prescribed for the admission of such testimony. Where, from the face of the will, in connection with the surrounding circumstances, a case is disclosed, upon which the judicial mind can take hold, and upon principles of reason or logic, arrive at a conclusion in regard to the testator's intention, then the case is one of construction for the court, and not one of intention depending upon extrinsic evidence and to be found by a jury. The case before us is one of this character, while cases falling under our first head could never be determined upon any such principle, and must therefore be submitted to a jury upon general evidence of intention. And it may be added, that this question is a matter of construction for the court appears manifest from the circumstance, that as far back as Lord Bacon's time, a rule of interpretation was adopted by which cases of this kind were to be determined, and that that rule, with certain qualifications, has been repeated and recognised down to the present period. If this therefore be a question purely of intention, to be governed by the peculiar facts of each case, as understood by different juries, does it not follow that the result would work a complete abrogation of the rule? In other words, where is the office of this or any other rule, if each case is to turn upon the intention of the testator independent of all rules?

Lord Bacon states the maxim of law to be, "*veritas nominis tollit errorem demonstrationis;*" which is, *the truth of the name takes away, or controls, the error of the description.* As recently as 1849, Chief Justice Gibson, in the case of *Brownfield vs. Brownfield*, already cited, adopts precisely the same rule, in this language: "Where a concurrent designation by name and description disagree, the rule is, that the former shall be taken to be more worthy in certainty." And the same rule is commented upon in the still more recent English case of *Camoys vs. Blundell*, 1 *House of Lords' Cases*, 778. Of the rule Lord Brougham says, "I admit its authority as a general principle."

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If, therefore, this rule comes to us well sanctioned, as it certainly does, then we are to conclude, that all questions falling within the purview of the rule, are to be governed by the rule, and that we have no more right to disregard rules of interpretation in arriving at the purpose of the testator, by submitting the question of intention to the jury, than we would have to disregard the long and well established rule adopted in *Shelly's case*, and to make all the questions so long controlled by that rule, depend entirely upon the capricious conclusions of juries, based upon facts outside of the instrument. All wills, it is true, depend upon the intention of the testator, but in every case, except the one already referred to, namely, where the designation is by a name, common, with equal certainty, to two or more persons or things, that intention must be ascertained by the court from the face of the will itself, and the surrounding circumstances which are connected with, or relate to, the parties, or the subject matter of the devise, and upon established rules of interpretation.

The error in the present case consists, in having submitted to the jury the question of intention, and in having received testimony other than that which was simply sufficient to bring the case within the operation of the rule, by showing that the name designated one person, while the description pointed to another. At this point of the case the rules of interpretation ought to have been invoked, and from them the intention ascertained.

As has before been remarked, the authorities do not sustain with unanimity the principles herein announced: on the contrary, many cases, especially those of earlier date, have admitted parol evidence, in its widest range, to go to the jury in cases in all respects like the present. But we repeat that such cases do not rest upon sound principle, and are not sustained by the more recent decisions. The case of *Vernor vs. Henry*, was a case like this, and although parol evidence was admitted to ascertain the intention of the testator, yet in the subsequent case of *Brownfield vs. Brownfield*, Judge Gibson in referring to his previous decision in *Vernor vs. Henry*, places the decision upon the express ground, that it was in pursuance of the

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rule of Bacon. He says, "I can, at present, recall but one case in which a legal conclusion has been drawn from modes of designation. Where, as in the case of *Vernor vs. Henry*, 3 *Watts*, 393; a concurrent designation by name and by description, disagree, the rule is that the former shall be taken to be the more worthy in certainty." The late cases of *Hiscocks vs. Hiscocks*, already cited, and *Miller vs. Travers*, 8 *Bing.*, 244, assail many of the earlier cases upon this question, as unsound. The court, in the first of those cases, say, "it must be owned, however, that there are decided cases which are not to be reconciled with this distinction in a manner altogether satisfactory." And again, "these cases, (*Thomas vs. Thomas* and *Beaumont vs. Fell*,) seem to us at variance with the decision in *Miller vs. Travers*, which is a decision entitled to great weight." By authority of the case of *Miller vs. Travers*, as well as that of *Hiscocks vs. Hiscocks*, the earlier cases of *Thomas vs. Thomas*, 6 *Term Rep.*, 671; and that of *Beaumont vs. Fell*, 2 *Peere Wms.*, 140, are expressly overruled, and we think properly. The case of *Douglas vs. Blackford*, 7 *Md. Rep.*, 8, fully supports the position, that in cases like the present, the question is one of construction for the court, and not a question of intention to be found by a jury.

This then brings us to the consideration of the last point suggested by this record, and that is, as a question of interpretation for the court, who takes under this will, the *daughter*, or the *wife*, of Jonathan German?

If the principle laid down by Bacon is to prevail as the unbending rule of law, upon the subject, without qualification, then the daughter would undoubtedly take. But Baron Parke in *Camoys vs. Blundell*, expressly says, that the rule "*is not inflexible*." and Lord Brougham in the same case adds, "I admit its authority as a general principle; but still, so far from its being an inflexible rule, I find the learned judges have held that it is not inflexible;" and a number of other cases to the same effect, might be cited.

The *reason* assigned for this principle, as a general rule of interpretation, is, that the name being more certain than the description, should therefore prevail. It would seem to follow

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as a necessary consequence, that the converse of the proposition would be true, if the description was more certain than the name. It would undoubtedly strike every one as reasonable, that the best and surest way to designate persons would be by the name they bear, yet, at the same time it must also be admitted that title or description, in many cases, would be a paramount and superior designation to the name itself even. What could be a more commanding or certain designation of any woman, than that of "*wife of*" such a man? How many females do we know, well, and even intimately, as the wives of particular individuals, without even knowing their christian names? The title, in such a case, is so unerring and complete as to absorb the name almost entirely:—in other words, it becomes the substitute for the name itself. Indeed, it is a very common practice at present, to convert the name of the husband into that of the wife, by simply affixing to the former the letters, "*Mrs.*," thus dispensing with the real christian female name almost entirely.

So with the titles, for example, of president, or governor, or the like. In such cases the designation points so unerringly to a particular individual, that the name becomes, comparatively, of small moment.

The precise point involved in the present appeal has been twice adjudicated and reported,—so far as we have been able to discover. The case of *Smith vs. Smith*, 1 *Edwards' N. Y. Chan. Rep.*, 189, it must be admitted is, in all respects, in direct conflict with the positions we have taken in this opinion. In the first place parol evidence was admitted, for the purpose of reaching the intention of the testator. One of the chief authorities relied on for such a proceeding, was the case of *Thomas vs. Thomas*, which we have shown has been overruled by the later and better cases. In the next place the old rule of Lord Bacon was recognised without qualification, and the description of "wife of N. S." was made to yield to *the name*, which pointed to another person. This case was decided in 1831.

On the other hand, the case of *Adams vs. Jones*, 9 *Eng. Law & Eq. Rep.*, 269, and which was decided as late as 1852, is a case directly in point to support the positions

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herein taken. In that case the devise was "to Clare Hannah Adams, the wife of Thomas Adams." A daughter of Thomas Adams was named Clare Hannah, but the name of his wife was simply Hannah. The daughter and wife, as in this case, both claimed the legacy. The court held that the question was one of construction by the court, from the face of the will, and decided in favor of the claim of the wife. The court say, "But, in the present case, the testatrix must have known who was the wife of Thomas Adams, and probably made a mistake in the name." The same theory would determine the present case in the same way. See, also, 1 *Coke Lit.*, 3 *a*, *(Ed. of* 1853.)

It is averred with confidence, that if this devise were submitted to the correct thinking and sound judging men of any or all professions, unembarrassed by the extrinsic evidence which has been made to surround and confuse the case, that ninety-nine out of every hundred of them would say the testatrix meant the *wife* and not the *daughter* of German.

In the view taken of this case, it would perhaps be unnecessary to express any opinion in regard to the first exception, which related to the admissibility of testimony. Some of the facts proposed to be proved, may have been (but I express no opinion) of that class which "stand well with the will," and were therefore admissible, and as the objection to the testimony was *general*, the court was probably right in overruling it. But if all the legal evidence applicable to the case and none other, had been received, the *prayer* of the appellant, which adopts the interpretation already suggested, ought to have been granted. But not having been granted, the judgment ought to be reversed.

This opinion has rested, throughout, upon the well settled and almost universally recognised principle of more modern times, that in no case is the bequest to be deemed void for uncertainty, as to the person or thing referred to, by the testator, if, with any degree of reasonable certainty, it can be ascertained upon legal rules of interpretation. I am in favor, therefore, of a reversal of the judgment.

But in the conclusions to which I have come in the forego-

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ing opinion, my brother judges do not concur. *Judge Eccleston* thinks, that upon a proper construction of the will, in connection with such evidence as was legally applicable to the case, the *daughter* of German is entitled to the property, and that the judgment ought to be affirmed. On the other hand, *Judge Tuck* is of the opinion, that the devise is void for uncertainty, and that the property embraced in it descends to the legal heir, as if the party had died intestate. Without approving of the result of the trial below, he nevertheless thinks, that the ruling of the court upon the first exception was correct, because the objection of the appellant to the admissibility of the testimony, having been general to the whole evidence, and as some of it was legal and proper, the objection was properly overruled under a well established rule frequently adopted by this court. *Judge Tuck* thinks, also, the prayer of the appellant was properly refused, because it asked the court to say that the property passed to German's wife, while he thinks it descends to the heir or heirs at law.

As between the heirs at law, and Anna Maria German, *the daughter*, I express no opinion.

The anomalous position of the court upon the questions involved in this case, leads inevitably to an affirmance of the judgment.

Judgment affirmed.

TUCK, J., delivered the following separate opinion:

Although the law, in some cases, admits evidence of surrounding facts, for the purpose of ascertaining the meaning a testator may have applied to certain words used in his will, it nowhere countenances the idea, that speculation or conjecture may be indulged in. The facts when received must satisfy the mind, at least beyond a reasonable doubt, that the exposition they are designed to support is the correct one. We must resort to the words of the will, (aided in those cases in which parol evidence is received,) free from conjecture. *Ram. on Wills*, 31. Lord Mansfield said, "Guesses may be formed, but that is not enough. Perhaps *quod voluit non dixit*. We cannot make a will for the testator. Conjectures

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may be made both ways." *Dougles*, 78. The intention must be gathered from the whole will so as to leave the mind quite satisfied about what the testator meant. 3 *Burr.*, 1531. We cannot proceed on loose conjectural interpretations, or by considering what a man may be imagined to do in the testator's circumstances. 1 *Eden*, 43. 3 *Term Rep.*, 85.

It is much to be regretted, I think, that parol evidence was ever admitted except in cases of undoubted latent ambiguity, such as where there are two persons of the same name, or two estates or other pieces of property known by the same designation, *each answering the words in the will*. Here, however, there are not two persons answering fully the name and description in the will. On its face it shows a plain intent, provided the person named is the wife of Jonathan German, but she is not; and hence the property cannot pass to either, *according to the words of the will as they are written*. If the claim of either be allowed so much of the will as would give the estate to the other must be overlooked or explained. The name applies to one and the description to another, and we are called upon to say which was intended as devisee of the property.

After carefully considering the case, with every disposition to avoid an intestacy, which the books tell us is our duty, I cannot, with any degree of confidence, satisfactory to my own mind, declare, that the exposition of either side is well founded. Part of the evidence taken alone would show one view to be correct, but that is fully met, if not overcome, by other portions of the proof, and when the whole evidence is considered in connection with the will the uncertainty is very much increased. The doctrines of the law applicable to these questions are fully discussed by Mr. Wigram under his sixth and seventh propositions, according to which, and the cases there cited, I am of opinion that a prayer affirming the right of either party, claiming as devisee, could not be granted. It is to be remembered that the law pays respect to the rights of the heir at law, and that he is not to be disinherited by slight implication or vague conjecture as to the intent of the testator, gathered from evidence of facts, of which, in the present case,

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it may be safely averred, there is much on both sides. The only safe test, if indeed any can be so called, where the door to parol evidence is once opened, is, as stated by *Wigram*, 99: "Do the words of the will, when all the circumstances of the case are known, express the intention which is ascribed to the testator? The court which interprets the will must be satisfied that they do so, and no other rule can, in the abstract, be laid down." I am not satisfied from the evidence offered, that either of these parties is entitled as devisee of the property in dispute, when the proof is applied to the language of the will. I consider the devise as inoperative from uncertainty, occasioned by a mistake which we have no power to correct. The prayer, which was refused, having asked the court to affirm the title of the defendant, it was properly refused, as should have been one offered on the hypothesis of the plaintiff's right as devisee. As was said in *Hiscocks vs. Hiscocks*, 5 *Mees. & Wels.*, 363, the plaintiffs must, for the present, succeed, but the claims of the heirs at law may ultimately prevail.

Catharine Binnerman, (formerly Catharine Weaver,) Adm'x *c. t. a.* of Caspar Weaver, *vs.* Wm. H. Weaver and Gotlieb Thater.

A devise, that "my wife shall keep possession of all my property during the continuance of her life, provided she doth stay unmarried," without a bequest over in the event of marriage, will not defeat the life estate of the wife, it being against the policy of the law and in restraint of marriage.

Under the laws of this State, a married woman may act as executrix or administratrix.

A testator directed that his wife should "keep possession of all his estate" during her life, "provided she doth stay unmarried, to take care of the younger children and raise them up until the youngest child is eighteen years of age; but if she should die or get permanently diseased, or in any other way unable to attend to the duties of the will," then he appointed

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two other persons "as administrators and guardians of his estate and personal property." HELD:

1st. That the widow was entitled to a life estate in the property embraced in the will, subject to the trusts engrafted upon it in favor of the children.

2nd. Having settled her accounts fully in the orphans court, the jurisdiction of that court ceases, and a court of equity alone can enforce the trusts created by the will.

APPEAL from the Orphans Court for Baltimore city.

This appeal was taken from an order of the orphans court revoking the grant of letters to the appellant and granting letters *d. b. n.* to the appellees, and directing the appellant to pass another administration account recharging herself with $2415.58, which, in her first account, was retained by her as the widow of the testator, and to distribute the same among those legally entitled. The facts of the case are fully stated in the opinion of this court.

The cause was argued before LEGRAND, C. J., TUCK and MASON, J.

Geo. H. Williams and *Cornelius McLean* for the appellant, argued:

1st. That by the true construction of the will of the testator, the appellant, his widow, is entitled, as tenant for life, subject to the obligation to support the testator's children until they arrive at the age specified; that the condition in restraint of marriage is null and void, and there being no limitation over it, *in terrorem* only, in any aspect of the case. *Story's Eq., secs.* 287, 289. 6 *Mass.*, 169, *Parsons vs. Winslow.*

2nd. That the time prescribed by our testamentary system having arrived, she distributed to herself, by her first and final account, all the estate of the deceased, which account was ratified by the orphans court; that that court, therefore, has no longer any jurisdiction over the property, and that parties entitled in remainder must seek another *forum* in which to enforce their rights, if any they have; that after a lapse of almost two years, the orphans court had no power to direct the appellant to recharge herself with property, the distribution of which

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they had ratified, and that the proceedings were *coram non judice;* the property could not be said to be unadministered.

3rd. Even if by marriage the appellant forfeited her tenancy for life, she did not forfeit her right to remain administratrix; that marriage is not only not a legal disability for such an office, but our testamentary laws recognise and provide for the appointment of married women. And that neither as matter of fact or law did the appellant's marriage render her unable to attend to the duties of the testator's will. And the orphans court, therefore, had no right to revoke her letters. *Act of* 1798, *ch.* 101, *sub-ch.* 4, *sec.* 8, and *sub-ch.* 14, *sec.* 7.

4th. That the estate of the testator having been fully administered, the administratrix still living and there being no evidence of any other assets, the orphans court had no power to appoint an administrator *de bonis non;* no case existed for such an appointment; no act of Assembly specifies marriage as a reason for revocation. *Act of* 1798, *ch.* 101, *sub-ch.* 5, *sec.* 6, and *sub-ch.* 14, *sec.* 14.

5th. That no party is entitled to any relief beyond that he prays for. Here is no prayer for revocation of letters nor for general relief, but only "that she may pass a distributive account, that petitioners may take charge of that portion of the estate to which the children were entitled." The court's decree goes far beyond the relief asked for in the petition.

6th. That as a married woman, the appellant's husband should have been cited and made a co-defendant.

John J. Snyder and *Charles F. Mayer* for the appellees, argued:

1st. The right of the appellant to *represent* the personal estate is made, by the will, coordinate with the right to possess the estate for the benefit of herself and *of her children, who are thence to have their support.* When that bequest to her ends her correlative administrative privileges cease. But apart from this, is it not clear that by her marriage she became, in the words of the will, "unable to attend to the duties of the will?" How could she, whilst under the restraints and embarrassments of a husband's control, carry out the will

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in its *essential purpose* of sustaining the children, when the very marriage cut off the *resources* which were, by the will, to be used for the support of the children? Her incompetency to perform the duties of the will was thus established by her marriage, and in such an event what was to supervene? The succession of new administrators in the present appellees. It was manifest then to the court, upon the allegations of the petition confessed by the answer, that the powers that had been conferred under a limitation affixed to them by the will had ceased. The court had, therefore, a right, and were even under an *ex-officio* duty, to revoke the administration or declare that the powers of the widow to act as such had ceased. To do this, which was an incumbent duty on the court, needed no prayer in the petition. But there is here what is equivalent to a prayer for such action, for not only does the petition begin with averring the rights of the appellees, but in asking for a distribution account, the object is stated to be, "that the petitioners may take charge of the portions of the estate to which the children are entitled under the will." How could such an investiture of the petitioners be had, unless by superseding the powers of the appellant as administratrix? The administration of the widow was a *conditional* or temporary one. The terms of the will so make it, and executorships of that character are recognised at law, and are, while they endure, not the less potential, because they may, by supervening circumstances or by efflux of time, come to an end. 2 *Shep. Touch.*, 401. *Co. Litt.*, 209, 960, 40. 8 *Coke*, 135, *Sir John Nedham's case*. The administration or virtual executorship of the appellant was here dealt with by the court as thus provisional or transitory.

2nd. If such was the character of the administration to be attached to it in obedience to the will it was to subserve, the jurisdiction of the court to act on the administration seems to follow as an incontestable result. It is not true, that because an account is passed which *implies* that debts are paid, the orphans court's control over the estate ceases. The act of 1798, ch. 101, sub-ch. 10, secs. 6, 10, 11, which speak of accounts showing all debts paid and presenting the estate ripe

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for distribution, *reserves the continuous administrative power* for ulterior assets. Whenever, in short, there can arise ground for the court's action within the scope of its ordinary jurisdiction, or for any step concerning its past exercise of jurisdiction, the orphans court may act. 8 *G. & J.*, 226, *Alexander vs. Stewart*. If once administration ceases, *let the cause be what it may*, what is to debar the court from constituting another for any *possible* assets or objects in future to accrue? See also the act of 1798, ch. 101, sub-ch. 10, sec. 11.

3rd. The husband was no necessary party to the petition. Even where administration *issues* to a married woman, it regularly goes to her *alone* and not to her husband conjointly. *Toller's Exc'rs*, 92. *Comyn's Digest, Administrators D.* 3 *Salk.*, 21. Being concerned only *jure alieno*, she is treated as sole in reference to the administration, and her husband is consequently no necessary party to any procedure for enforcing from her an account, or otherwise bearing on her administrative capacity.

4th. But it is said, this devise is, so far as it limits her benefit until she marries again, void as in restraint of marriage. It might suffice to say:—1st. That she is debarred any such objection to the bequest, as she has made her election to abide by the will. 2nd. That the bequest is not merely to the widow, but effectively is to her *and* the children, especially the younger children. 3rd. That the children being thus the principal objects of the provision and *their* interests trenched on *only* so far as the unmarried state of the widow continues, this is the case of a *bequest over* upon the marriage, and it is well settled, that where there is a bequest over, conditions in restraint of marriage are valid. 1 *Roper on Leg.*, 555. 3 *Atk.*, 367, *Wheeler vs. Bingham*. *Bac. Abr., Legacies F.* 2 *Vernon*, 357, *Stratton vs. Grymes*. But it is well settled, that a husband's devise or bequest to his widow, *durante viduitate*, is good as a limitation. 1 *Story's Eq., sec.* 285. 2 *Vernon.*, 308, *Barton vs. Barton*. 2 *Greenlf's Cruise*, 22, 47. 2 *Wms. Exc'rs*, 914, 918. 2 *Brown's Ch. Rep.*, 488, *Scott vs. Tyler*. 3 *H. & McH.*, 93, *O'Neale vs. Ward*. There is no case contravening this position except that cited

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from 6 *Mass.*, 169; but that decision is of no weight, and as thus insignificant against the established principle it is treated by Story and Greenleaf. Again, in *any* case the bequest ceases on marriage when that is assigned as the terminating event, whenever the terms so confining the bequest are to be construed a *limitation*, and not a condition, and no precise words are required for such an operation. The limitation, "until" or "so long as," or any words curtailing the enjoyment and looking to duration, make a limitation. 1 *Roper on Leg.*, 525, 558, 758, 759, and notes. 2 *Wms. on Exc'rs*, 914, 918. 2 *Atk.*, 321, *Richards vs. Baker*. What words could be suggested more directly creating *a limitation* than the words here used, "provided she shall *stay unmarried;*" pointing to the continuance of an existing state—to a termination by an event of a benefit at once entered into? The doctrine of *limitation*, as contradistinguished from condition, under this title of conditions in restraint of marriage, is not peculiar to real estate or *devises*. It is the rule as to *bequests* and the cases cited are of personalty. It is consequently clear, that so far as the interest of the widow, as legatee, is made the measure of determining the scope of her power as administratrix, her authority ceased by her marriage. Upon these considerations we submit, that in form and in substance we are entitled to an affirmance of the decree of the orphans court.

Le Grand, C. J., delivered the opinion of this court.

The appellees filed in the orphans court for Baltimore city a petition stating, that a certain Caspar Weaver, by his last will and testament, appointed his wife, Catharine, his executrix, with power to take charge of his entire estate, collect rents, &c., until his youngest child should become eighteen years of age, provided she remained unmarried; but that in the event of her marriage, and for other causes mentioned in the will, then the petitioners should act as executors and guardian's of his estate. It further represented that the said Catharine had contracted marriage with one John H. Binnerman; and prayed that the court pass an order "directing her to pass a distributive account, so that the petitioners might take charge

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of that portion of such estate to which the children might be entitled."

The appellant replied to this application, stating that letters of administration had been duly granted to her, and that she had fully settled said estate so far as the orphans court is concerned; and claiming also, that by a proper construction of the will of her testator, she is entitled to the entire estate during her life.

At the hearing of the cause the court revoked the letters of administration granted to the appellant, and granted letters *de bonis non* to the appellees. The court also directed that the appellant should state another account, in which she should recharge herself with the sum of $2415.50, which was in her first administration account retained by her as the widow of the said Caspar Weaver, deceased.

The clause in the will which gives rise to this controversy is in these words:

"Baltimore, June the eleventh, in the year of our Lord, one thousand, eight hundred and fifty-one, I, Caspar Weaver, *I* know all men by these presents, and make this instrument of writing my last will a testament, as follows: That my wife, (Catharine Weaver,) shall keep possession of all my property during the continuance of her life, *proviting* she *doths* stay unmarried to take care of the younger children and raise them up until the youngest child is eighteen years of age, and that she shall draw the rents of said property and settle all incumbrances thereon to the best advantage; but if said wife should depart this life or should get permanently deseased, or in any other way unable to attend to the duties of my will, I then select my son, William Henry Weaver, and my son-in-law, Gotlieb Thater, as administrators and as *gardiens* of my estate and personal property."

On the part of the appellees it is contended, that the true construction of this very singular paper is, that on the marriage of the appellant the letters granted to her ought to be revoked and letters *de bonis non* granted to the appellees.

Under the laws of this State a married woman may act as executrix or administratrix. There is nothing then to dis-

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qualify her except it be found in the language of the will. To say the least of it, it is very doubtful whether it was not the intention of the testator only to appoint the appellees in case his wife "should depart this life, or should get permanently diseased, or in any other way unable to attend to the duties" of the will. But be this as it may, it is clear, that the bequest to the wife, during life, without a bequest over in the event of marriage, is not such a bequest as will defeat the life-estate, it being against the policy of the law and in restraint of marriage. It may be said here, as it was in the case of *Evans, et al., vs. Iglehart*, 6 *Gill & John.*, 185, "a life-estate in a chattel may be granted for life to one person, and the same with its issue or increase be limited over to another; but this cannot be done but by express words or necessary implication. Here no such express words are used; no such necessary implication arises."

In any event the appellant would be entitled to her interest, *jure mariti*, and as she has settled her accounts fully the jurisdiction of the orphans court ceases, and a court of equity alone can enforce the trust created by the will, if any such be raised by it.

We are of opinion, however, that the appellant is entitled to a life-estate in the property embraced in the will of her testator, subject to the trusts engrafted upon it. She cannot be required to recharge herself as directed by the order of the orphans court. The settlement already made by her discharges her bond, and if she fails to perform her duty as enjoined in the will the remedy is in a court of equity.

Order reversed and petition dismissed.

Sarah Hitch *vs.* Jacob G. Davis.

A decree dismissing so much of a bill as related to or sought to recover from the defendant as respects a certain note, is a final adjudication of that particular question unless appealed from in due time, and after the time for an appeal has passed the question cannot be revived by a petition for a

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rehearing, or by the fact that in the auditor's account the note was charged to the defendant, to which exceptions were filed and overruled, and from the order overruling them an appeal was taken in due time.

APPEAL from the Court of Chancery.

The original bill in this case was filed by the appellant, claiming, among other things, a note for $2673.75 as a *gift* to the complainant from her father, Solomon Betts, during his lifetime. The defendant Davis was the executor and trustee appointed by the will of Betts to execute the trusts thereof, and the other claims in the bill were founded upon provisions in the will of Betts in favor of his daughter, the complainant.

On the 9th of May 1851, the chancellor filed an opinion and passed a decree dismissing the bill, "so far as it seeks to recover from the defendant, Jacob G. Davis, for or in respect of the note of Lloyd N. Rogers to Solomon Betts, dated the 17th of November 1838, in the proceedings mentioned," but that the bill in other respects be retained, with leave to make Krebs a party, who had been appointed trustee in place of Davis. A supplemental bill was then filed making Krebs a party, and he having answered, the chancellor, on the 9th of February 1852, passed another order or decree referring the case to the auditor, "with reference to the questions left open by the opinion and decree of the 9th of May 1851," for the purpose of stating the necessary accounts preparatory to a final decree.

The auditor stated several accounts, and in one of them, stated under directions from the solicitor of the complainant, the defendant Davis was charged with the note of Rogers referred to, as *executor* of Solomon Betts. Davis excepted to this account, and also to the sufficiency of the averments of the original and supplemental bills, to enable the complainant to recover for this note. The chancellor, on the 26th of March 1853, filed an opinion deciding that with reference to this note there had been a final adjudication upon the bill, which claimed it as the property of the complainant *solely* by virtue of a *parol gift* of it to her by her father in his lifetime, and that the bill could not be *amended* for the purpose of raising the question of the applicability of the note as an asset in the hands of the

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defendant to the payment of the pecuniary legacies. The chancellor therefore sustained the defendant's exception to the auditor's account in which he was charged with this note, and, on the 31st of March 1853, passed an order to that effect.

Afterwards, on the 26th of March 1853, the complainant filed a petition stating that, as she understood it, the order dismissing the bill before the final decree extended only to the dismissal of the same in regard to the *individual claim* to the note in question, and not in regard to that note as forming part of the estate of Betts under the general allegations of the bill, and prayer for account and payment of the $5000 legacy to her; that if the decree now stands it might be pleaded to any action or future bill to be brought against Davis for the amount of the note, and would therefore operate as a gift to him of the amount thereof. She therefore prays that the case may be reheard, as she is informed that the points to which she has referred were owing to the misapprehension entertained in regard to the effect of the order of dismissal of the bill in regard to the note. This petition the chancellor dismissed by order passed on the 25th of May 1853.

Afterwards, on the 2nd of June 1853, the complainant entered an appeal "from the decree of the 9th of May 1851, dismissing the bill as to the note of Rogers, and also from the order of the 31st of March 1853." The several opinions of the chancellor are reported in 3 *Md. Ch. Dec.*, 266.

The cause was argued before LE GRAND, C. J., TUCK and MASON, J.

H. Lennox Bond, *H. Winter Davis* and *Grafton L. Dulany* for the appellant, argued:

1st. That the dismission of the bill as to Rogers' note is erroneous, for 1st. There is proof from which the court can infer a valid gift of the note by the testator to the appellant, a gift which the executor recognised and admitted by paying her, after the testator's death, the preceding interest. 3 *Gill*, 278, *Isaac vs. Williams*. 1 *Bailey*, 117, *McClung vs. Lockhart*. 2 *Do.*, 588. *Pitts vs. Mangum*. 10 *Johns.*, 293, *Grangiac vs.*

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Arden. 2nd. There is no sufficient exception to the allegations of the bill touching the note in that aspect of the bill, which asserts a gift *inter vivos* of the note to the complainant. 2 *G. & J.*, 208, *Pennington vs. Gittings.*

2nd. But if the claim to the note under the alleged gift cannot be maintained, then we insist: 1st. That the bill distinctly prays for an account of the assets of Betts in the executor's hands and payment of the legacy of $5000. 2nd. The report shows a clear insufficiency of assets to pay the whole legacy, whether the note of Rogers be or be not included. 3rd. The allegations of the bill are sufficient to form a general order for an account of the whole assets of Betts in order to ascertain the extent to which assets are in the executor's hands applicable to this legacy. 4th. If this note was not validly given to the complainant in the testator's lifetime, then it remained his property till his death and formed part of his assets in the executor's hands, unless it was disposed of otherwise in the testator's lifetime. 5th. The evidence shows that the testator never did transfer his right to this note to any one but the complainant, and if the transfer to her failed it remained in the testator. 6th. It therefore constituted a part of the assets of his estate, and the payment of the note by Rogers is distinctly proved. 7th. The executor does not assert that the note was given to him by the testator, nor that it was transferred to any one else. 8th. The proceedings in the orphans court constitute no plea in bar to this item, for there was no judgment passed on the petition; the parties were different, and even a direct refusal to charge the executor with the item would not be such a final judgment as would preclude the court of chancery from charging him on a bill to account. 3 *Chitty's Pl.*, 298, 299. 3 *East.*, 346, *Outram vs. Morewood.* 1 *Stark. on Ev.*, 225, 226. 4 *Barn. & Cres.*, 625, *Plummer vs. Woodburne.* 1 *Gill*, 1, 2, 30, *Stevenson vs. Reigart.* 12 *G. & J.*, 456, 467, *State, use of Hickley, vs. Stewart, et al.* 9th. If therefore it was right to dismiss the bill because there was not a title to the note shown under the alleged gift, then the whole bill, so far as it asserted title in that character, was out of court. It was not before the court *at all.* It was

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as if a pen had been drawn through those parts of the bill and prayer asking for the note. The bill then stood, as a general bill, for an account of assets of Betts' estate; for an account of the money received by Davis as trustee of Mrs. Hitch, and for payment of what was due and unpaid. 10th. If the allegations of the bill did not state facts which, in law, involved a valid gift, then this view is so much the stronger, for without a dismission the complainant could insist there was no gift shown, and therefore none could be noticed by the court, and nothing was before the court but the general bill for an account against the trustee and the executor. 11th. If the decree be rightly held to have dismissed the bill as to the note, not merely so far as it was claimed under the *gift*, but also so far as it was claimed as part of the estate of Betts, not passing by the gift, then the decree was erroneous, for either the note was given to Mrs. Hitch or it remained part of the estate. If *not given* then to dismiss the bill, as to that item *wholly*, is to give the note to the executor free from all account, since this decree bars any other suit, and by hypothesis this bill is out of court as to that item. The appellant therefore insists:

1st. That the bill ought not to have been dismissed as to her claim to the note under the gift.

2nd. If it ought, then the decree should have been confined to a dismission of the bill, so far as that title to the note was asserted; and therefore:

3rd. If the decree is confined to a *dismission as to that title*, the refusal to charge the executor with the note was erroneous. If the decree was not so confined but dismissed the bill wholly as to the note, whether as claimed under the *gift* or as an item of the assets of the testator, it is erroneous, in depriving the legatee of a part of the assets of the estate to pay the legacy, because she has failed to prove a title to it by gift.

Thomas G. Pratt for the appellee, moved to dismiss the appeal, and in support of this motion, argued:

1st. That in effect and substance the appeal is taken from the decree of May 1851, and that being first taken more than nine months (in fact two years) after that decree, is too late

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and must be dismissed. *Alex. Ch. Pr.*, 182. *Act of* 1826, *ch.* 200, *sec.* 14. 3 *Md. Rep.*, 478, *Glenn vs. Chesapeake Bank, et al.* 3 *Md. Ch. Dec.*, 270, *Hitch vs. Davis.*

2nd. That the appellant cannot, in this court, successfully predicate his right to maintain this appeal upon the subsequent introduction of this claim by the auditor in his report, and the consequent subsequent obligation of the chancellor to reject it. Nor can he successfully resist this motion to dismiss upon the ground that he had filed a petition for a rehearing, and that he had asked for an appeal within nine months from the date of the refusal to gratify that petition. As the effect of the first proposition would be to give to the auditor, and of the second proposition to give to the party, the unlimited power to extend the right to appeal.

3rd. That the only proper office of a petition for a rehearing is to alter or set aside the decree *before enrolment*, and that a petition for rehearing was never before filed in a court of chancery to set aside a decree which had been enrolled for more than two years before the date of such petition. *Alex. Ch. Pr.*, 177, 178. 1 *G. & J.*, 393, *Burch, et al., vs. Scott.*

Mason, J., delivered the opinion of this court.

The only question before the court upon this appeal is, whether we shall dismiss the appeal or affirm the decree of the chancellor: one of comparatively small importance to the parties, or in principle, as the result would be the same.

That the decree of the chancellor of the 9th of May 1851, dismissing so much of the bill as related to, or sought to recover from, the defendant, as respects the note of Rogers, was a final and conclusive adjudication of that particular question, unless it had been in due time regularly appealed from, there can be no doubt. This was not done in the time required by law, and therefore we must regard that question as finally settled, and the chancellor was right in not permitting the complainant to revive the point in the indirect mode proposed. As it matters little whether we affirm the decree or dismiss the appeal, we will adopt the former course.

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The principle upon which this matter is to be determined has been recognised and settled in the cases of *Ringgold vs. Emory*, 1 *Md. Rep.*, 348, and *Lefever vs. Lefever*, 6 *Md. Rep.*, 472.

Decree affirmed, with costs.

Citizens Bank of Baltimore *vs.* John A. Howell & Brothers.

In this State when a note or bill is received in the ordinary course of business, without any special agreement on the subject, by a bank for collection, and the bank in due time delivers it to the notary usually employed by it in such matters, so that the necessary demand, protest and notices may be made and given, the bank will not be answerable for loss resulting from the failure of the notary to perform his duty.

The act of 1837, ch. 253, makes protests of inland bills and promissory notes *prima facie* evidence, and to secure the benefit of this law to the owners of such instruments it is the duty of the banks receiving them for collection to place them in the hands of a notary that they may be protested in due time when necessary.

Appeal from the Court of Common Pleas for Baltimore city.

Assumpsit by the appellees against the appellant to recover the amount of a promissory note for $122.11, at sixty days, dated the 25th of March 1851, drawn by Wesley F. Walter in favor of Edmond T. H. Walter, the payee, who endorsed it to the plaintiffs, who deposited it with the defendant, the bank, for collection, and the amount of which, the declaration alleges, was lost to the plaintiffs by the neglect of the notary public employed by the bank, in not properly notifying the endorser of the dishonor of the note by the maker. Plea, *non assumpsit*.

Exception. The plaintiffs offered in evidence the protest of the note by the notary, stating that it was presented at the place of business of the maker, and the reply was, that it could not be paid; and that the notice of this dishonor for

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the endorser "*was left at Wesley F. Walter's.*" They then proved the handwriting of the maker and endorser, and that before its maturity, viz., on the 24th of March 1851, they deposited it with the Citizens Bank for collection; that Duvall, a notary public, called at their store on the 27th of May 1851, with the note, and asked if they wished it protested, and was informed that they did; and that the maker resided in Caroline street; and the place of business of the endorser was No. 3, West Pratt street; and that the maker was insolvent, but the endorser was good. They further proved, that the endorser's place of business is at No. 3, West Pratt street, but that his name was not upon the sign over the door; and that his place of residence was in East Baltimore street, in 1851; they further offered in evidence the City Directory for 1851, showing the endorser's place of business to be at No. 3, West Pratt street, and the maker's residence in Caroline street at the time of the protest.

The defendant then proved by Duvall, the notary, that he was a duly commissioned notary in the city of Baltimore; that it is the universal usage and custom of the banks in that city to cause demand, protest and notice to endorsers to be made and given by a notary in case of inland as well as foreign bills of exchange and promissory notes; and that he was in the habit of discharging those duties for the defendant, the Franklin Bank, and Purvis & Gover, bankers; that the note in question was handed to him by the bank on the day of its maturity, with directions to enquire of the plaintiffs whether they wished it protested; that he called at their store and enquired of their clerk if they wished it protested, and the reply was that they did; that he then enquired of the same party where the maker and endorser resided, and was informed that they resided in Caroline street; that he has no recollection that he said the endorser's place of business was at No. 3, West Pratt street, and does not believe he did, because in going to Caroline street he had to pass immediately by the door of No. 3, West Pratt street, and would, of course, have called; that he had difficulty in finding their residence in Caroline street, and meeting with a man at work he asked him where the maker and endorser

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resided, and was told on the opposite side of the street, pointing to the house, that he called at the house and inquired of a lady who came to the door, if Wesley F. Walter was in, she replied no; he then asked if Edmond T. H. Walter was in, she said no; witness then handed her a notice and requested her to give it to him when he came in. The defendant also offered in evidence the Directory of 1849, and also that of 1851; in the first of which the endorser's residence is given, viz., West Fayette street, and in the latter no residence is recorded. The defendant also proved by the cashier of the Union Bank, that it is the universal custom and usage of the banks in the city of Baltimore to cause demand, protest and notice to be done by a notary of bills and notes, as well those deposited with the banks as their own. The defendant then asked the following instructions to the jury:

1st. That if they shall believe from the evidence in the cause, that the note in question being duly made and endorsed, was, on the 24th of March 1851, deposited with the defendant for collection; that it was duly handed to Duvall, a notary duly appointed and commissioned for the city of Baltimore, and that he having enquired at the counting-house of the plaintiffs was informed that the drawer and endorser both lived in Caroline street, and made other inquiry and was also informed by others that they resided in Caroline street, and that notice was accordingly left at said place, and at the same time directed to the said endorser; and notice was also given to the plaintiffs on said day at their place of business and between said hours; that it is the universal custom and usage of banks in the city of Baltimore to hand all notes to a notary of said city for presentment and notice, as well such as are left with them for collection as those belonging to them, then the plaintiffs are not entitled to recover, although the jury may further find that the endorser did not reside with the maker, but had a residence in another part of the city but not recorded in the Directory for the year 1851; and also had a place of business which was named in the Directory for said year, and that said notary, as soon as he had ascertained that he had mistaken the residence, gave notice to said endorser, *first*, because the

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defendant is not responsible for the want of due diligence, if any, on the part of the notary; and *secondly*, because due diligence was used by the notary as well as by the defendant.

2nd. That the bank having complied with its uniform usage as well as the usage of the banks of the city of Baltimore, by delivering the note at the regular time to the notary public, had entirely discharged its duty and relieved itself from all responsibility in the premises to the plaintiffs.

3rd. That the notary public was not in any wise the agent of the bank, he being a public officer, created as such by the law, upon whom devolves all the responsibility arising from a failure to perform his official duties in a proper manner, and that therefore the bank was not responsible for any failure of duty on the part of the notary.

4th. If the jury find that it is the usage of the banks in the city of Baltimore to cause all demands, protests and notices to be made and given by a notary, that the bank in this case is not responsible for the acts of the notary, unless they believe that there was a special contract by the bank to be responsible for the acts of the notary, of which there is no evidence.

These instructions the court, (MARSHALL, J.,) refused to give, but was of opinion and directed the jury as set out in the opinion of this court. "To which opinion and direction of the court to the jury" the defendant excepted, and the verdict and judgment being in favor of the plaintiffs the bank appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, J.

D. C. H. Emory and *Thos. S. Alexander* for the appellant.

The appellees suppose the only question open on the exception involves the propriety of the instruction given by the court to the jury. But it is apparent from the structure of the whole exception, that the appellants intended to except as well to the refusal of the court to give the instructions prayed for as the instruction actually given. The instruction is, in truth, a response to the prayer, and involves the very contrary of the pro-

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positions advanced by the defendants. Thus the court say, there is evidence of a special contract by which the bank guaranteed the plaintiffs against the neglect of the notary. The defendant had insisted that there was no such evidence. The court instructed the jury that there was evidence of negligence or omission on the part of the notary. The defendant had asked for an instruction, that upon the facts offered in evidence the charge of negligence was not made out. Conceding, then, for sake of the argument, that in the general an exception to the instruction actually given will not entitle the party to contest the propriety of the court's refusal to give the instruction prayed for, it is insisted that the rule does not apply to a case like the present, where the subject of the instruction is identical with the subject of the prayer, and the instruction is intended as a response to the prayer. In such case the instruction is wrong if the prayer ought to have been granted.

We propose to discuss, in the first place, therefore, the propriety of the defendant's prayers, and then the propriety of the court's instructions to the jury. The plaintiffs' case supposes that the notary was guilty of negligence, and that the defendant is liable for such neglect of the notary. We shall endeavor to show that there was no negligence on the part of the notary, and next, assuming there was negligence, that the bank is not responsible therefor.

When the holder is ignorant of the place of residence of an indorser, he may excuse his failure to give notice of the dishonor of the bill or note to such party, by showing that he used reasonable diligence in the effort to ascertain the place of residence of the party, but without success. And if, on inquiry of persons whom he has fair reason to believe can give him correct information on the subject, he does receive information which he credits and acts on, he is likewise excused.

Reasonable diligence is that degree of diligence which men of ordinary habits of attention to business usually devote to their own affairs. What is reasonable diligence depends on the special circumstances, and is usually, therefore, a mixed question of law and fact. But where the state of facts is given or assumed, it becomes a question of law to be determined by

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the court. For the rule and its application, we refer to *Chitty on Bills*, 453, and *passim.*, and especially to 4 *How.*, 336, *Harris vs. Robinson*, and 9 *How.*, 552, *Lambert vs. Ghiselin;* in this last case the bill, being protested in Baltimore in the year 1846, was returned to the holders in Alexandria. They addressed notices to the indorser at Nottingham. They acted on information received from a person who had, prior to the year 1842, sailed a vessel between Nottingham and Alexandria; and showed there was in 1846 little intercourse between the two places; and that there was no one in Alexandria who was likely to give more correct information on the subject. In fact, the indorser resided in early life in Nottingham, but had removed thence as early as the year 1839. But the Supreme Court were of opinion, that due diligence had been used by the holder and the indorser was held liable. In the present case the notary addressed himself to the plaintiffs, and by the clerk he was informed that the maker and indorser resided together in Caroline street. He proceeded thither, making inquiry of a number of persons on the street. At length he met a laborer, in his shirt sleeves at work, of whom he inquired where the maker and indorser resided, and by him he (the notary) was told that they resided in a house on the opposite side of the street, to which the laborer pointed. He called at that house and was met at the door by a lady, who, to his inquiry whether the drawer was in, answered no. The notary then handed her a notice addressed to the indorser, and requested her to hand it to him when he came in. On the same day notice of dishonor was also given to the plaintiffs. The plaintiffs attempted to prove, that their clerk had also informed the notary that the indorser had a place of business in Pratt street. But the notary has no recollection of any such statement having been made, and the reason stated by him would seem to be conclusive on the subject. He passed through Pratt street on his way to Caroline street, which is beyond the limits of business in Baltimore and is comparatively an obscure street, and there wasted time in making inquiries which would have been unnecessary if the notary had understood that the drawer had a place of business in Pratt

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street. On the whole evidence it is admitted, that the notary evinced a strong desire to discharge his duty—that he labored faithfully to discharge his duty—and that he really believed he had in good faith acquitted himself of his duty. What more can be expected in any case?

But again, the plaintiffs have failed in proving any special agreement between them and the bank. They deny that the usage of the bank, to hand over all bills and notes to the notary, can bind them. They trusted to the bank. The notary was the bank's agent; and what was done and what was omitted to be done by the agent, are to be treated as done and omitted by the bank itself. The General Law Merchant is, therefore, to be invoked to determine whether the bank, as collecting agent, has fulfilled its duty. Now we apprehend it is clear, that the holder of a bill is bound to give notice to such of the parties as he proposes to hold answerable to himself. If he gives notice to the last indorser only, this latter has the right, and if he deems it essential to his own indemnity, must give notice to the prior parties in obligation on the paper. If the demand is made by an agent, it is sufficient that he give notice of dishonor to his principal, and it then becomes necessary for the principal to give the proper notices to the prior parties to be fixed. 3 *Bos. & Pul.*, 599, *Haynes vs. Birks;* 8 *Barn. & Cres.*, 387, *Firth vs. Thrush*, and 2 *Johns. Cases*, 1, *Tunno vs. Lague*, will be sufficient on this point. Now, it is put to the jury to find, as a part of our case, that the notary gave a notice of dishonor to the plaintiffs on the very day on which the note became payable. Again, the general law does not require that the notary shall assume the office of a general directory, and know at his peril the residence of every one who may become a party to negotiable paper. He is at liberty to apply to the holder for direction, and if the holder undertakes to give information which turns out to be erroneous, the loss must be borne by himself. In this case the notary informed the plaintiffs that the note was in his hands; he inquired whether the note was to be protested if not honored, and where the indorser was to be found. He was informed by the holder that the indorser resided on Caroline street.

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He betook himself accordingly to Caroline street, and whilst there made every effort to discover the house wherein the indorser was supposed to reside. The charge now is that he was misled by the holders. Conceding, then, for the sake of the argument, that there was neglect on the part of the notary, we deny that the appellant is liable for the consequences thereof.

It was proved to be the invariable usage of the banks in Baltimore to cause demand, protest and notices to indorsers to be made and given by a notary, in the case of inland as well as foreign bills and notes. And the prayer puts it to the jury to find that this usage exists, as well in relation to bills and notes left with the banks for collection as to those which are issued by them. Of this usage the plaintiffs had actual notice; and in the absence of such proof, it would be presumed that they had notice thereof and that their deposit was made with reference to the usage. 11 *Wheat.*, 431, *Mills vs. Bank of the United States.* The placing of the note with the defendant was equivalent to an agreement, that it should be delivered by the defendant to a notary for the purpose of demand and protest, in accordance with the usage. 6 *H. & J.*, 150, *Jackson vs. Union Bank.* The usage is reasonable in itself and highly proper to be observed, since the act of 1837, ch. 253, makes the protest *prima facie* evidence of the facts of demand and notice of dishonor to the indorsers. The usage was obligatory on the bank. If it had failed to hand the note over to the notary, and by such failure had deprived the plaintiffs of the facilities for establishing their case against the indorsers, which would have been supplied by the protest, the bank might have been held answerable for all the consequences of the default. But if the plaintiffs had a right to require the delivery of the note to the notary, in order to insure to them the advantages to be derived from a notarial protest, and if the omission to deliver the note over to the notary would have been culpable negligence on the part of the bank, with what color of justice can it be pretended that the bank, which has delivered the note to the notary in deference to the usage, shall be responsible for the defaults of the notary in the performance of his

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duty? In 4 *Whart.*, 105, *Bellemire vs. Bank of United States* and same case in 1 *Miles*, 173, it was expressly adjudged, that where a bank receiving a note for collection, hands it over to a notary for the purposes of demand, conformably to the usage of the bank, it is not liable for any act or default of the notary. *Vide* also 1 *La. An. Rep.*, 13, *Baldwin vs. Bank of Louisiana.* 17 *La. Rep.*, 560, *Hyde vs. Planters Bank.*

It is undoubtedly a general rule, that an agent cannot delegate his authority, and is, therefore, in the general, held to answer for the deficiencies of the persons employed by him. They are treated as his agents. But the usage of trade sometimes requires, and at other times justifies, a departure from the rule. And where, in deference to usage, the deputy is selected, he becomes the agent of the principal, and is answerable to the principal for any negligence in the discharge of his duty. The agent is never responsible for the defaults of a deputy who has been appointed, according to the usage of trade, to assist him in the performance of his agency. *Story on Agency, sec.* 201. 1 *G. & J.*, 147, *Pawson vs. Donnell.*

Thus it is settled, that the owner or master is not liable for a collision happening whilst the vessel is in charge of a licensed pilot. In 22 *Conn.*, 213, *Windham Bank vs. Norton*, it was held, that the holder is not responsible for delay occasioned by miscarriage of a letter containing a note through the negligence of the post-office. These cases are strictly analogous to the case of the notary, who, like the pilot and the postmaster, is clothed with official authority. In 6 *H. & J.*, 150, *Jackson vs. Union Bank*, this court suppose, that a foreign merchant sends goods to his consignee in Baltimore, with instructions to dispose of them for him to the best advantage; the consignee sends them to auction, the auctioneer makes way with the goods, or sells them and makes way with the money, and fails, in such case it is declared, the consignee would not be responsible; and the court therefore adjudge, that if a bill drawn on Washington is deposited with a bank in Baltimore for collection, and is by that bank remitted to a bank at Washington—its usual agent—to be collected, this last bank becomes the agent of the holder, and its defaults are not to be visited

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against the bank in Baltimore. 23 *Pick.*, 330, *Fabens vs. The Mercantile Bank.* 1 *Cush.*, 177, *Dorchester Bank vs. New England Bank.* 12 *Conn.*, 303, *East-Haddam Bank vs. Scovil*, amongst others, may be cited to the same effect.

A different rule would seem to prevail in New York. In 22 *Wend.*, 215, *Allen vs. Merchants Bank*, it was held, that the bank to which the note was remitted for collection was the agent of the bank with which the note was deposited by the holder, and the latter bank was liable to the holder for the defaults of its agent. This is the leading case on the subject in New York, and was decided in the Court of Errors by a vote of fourteen to ten, reversing the judgment of the Supreme Court. The ground of the New York rule is stated, in 223, to be, that the acceptance of negotiable paper thus deposited for collection forms an implied undertaking to make the demand, and give the notice required by law or mercantile usage, for the perfect protection of the holder's rights against all previous parties—for which undertaking the use of the funds thus temporarily obtained, or of the average balances thereof for the purposes of discount or exchange, forms a valuable consideration. Now it will be observed, that the liability of the bank is thus rested on contract implied by law, from the fact that the depositary is a bank of discount and deposit, ordinarily using the funds of its customers in the transaction of its own business. The profit which is derived from the employment of the aggregate balances to the credit of its customers, is the consideration upon which the law will imply a special contract with the wayfarer who accidentally deposits a bill for collection, to indemnify him against the defaults of the agents who may be employed in the collection of that bill. Conceding that the guarantee ought to be sustained against the defaults of the clerks of the bank or other agents, voluntarily selected to assist in the discharge of its agency, there would yet remain a difficulty in extending it to the default of a public officer to whom the note was entrusted, for the purpose of authenticating the facts which fix the responsibility of the indorsers, and of thereby facilitating the recovery of the claim by the holders against them. There was no proof offered of usage or commercial

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understanding, that the banks should assume any unusual responsibility for agents, whose appointment should be rendered necessary by usage or the exigency of business, much less that they should assume the obligation of giving notice of dishonor to all the parties to the instrument. In England it is certain, that the banker is bound to give notice of dishonor only to the holder by whom the bill was deposited for collection, (3 *Bos. & Pul.*, 599, *Haynes vs. Birks,*) and the inference is very fair, that the courts at Westminster would ignore the existence of the other branch of the supposed implied contract. If the use of the average balances in hand is a consideration for the contract, to be implied that the banker shall guarantee his customers against the negligence of the agents necessarily employed by the agent, why should not the law, in the case supposed in *Jackson vs. Union Bank*, imply a contract or undertaking, on the part of the consignee, to indemnify his principal against the frauds of the auctioneer employed to sell the goods consigned?

The ground assumed in New York is *petitio principii*, assumed in the absence of evidence, sustained by no authority, and warranted by no principle. But it will be sufficient to conclude the argument by suggesting, that the decision, and the reasoning on which it is rested, are directly at variance with the point adjudged and the reasoning adopted by this court in *Jackson vs. Union Bank.*

The instruction given by the court below assumes there was evidence of a special contract on the part of the bank to do all that was necessary to fix the responsibility of all prior parties to the plaintiffs. But there was no evidence of any such special contract. The extent of the obligation of the bank was determinable by the general law. The court ought to have stated what were the obligations which this general law casts on the bank, and ought not to have left it to the jury to find what were the obligations of the contract which this law implied from the relation of depositor and depositary existing between the parties. In this particular the jury were required to find matter of law.

But in the next place, the court based the second branch of its instructions upon the facts enumerated in the first branch

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thereof, and amongst others, upon the fact that the plaintiffs had misdirected the notary as to the actual residence of the indorser. The effect of the instruction then was, that if the jury should, from the relation of depositor and depositary, imply a contract on the part of the bank to do all that was necessary to fix the liability of the indorser, and that the bank had not given due notice to the indorser, then the plaintiffs were entitled to recover, although they should find that the plaintiffs had misdirected the notary as to the actual residence of the indorser, and that the failure to give proper notice to the indorser was the necessary consequence of such misdirection. In this, as before stated, the jury were charged to find what were the legal consequences resulting from the relation of depositor and depositary. And the contract supposed, being implied as matter of law, the court instruct the jury, that the defendant cannot excuse the non-performance of the contract, by showing that this default was caused by the false information given to the notary by the plaintiffs. This would be hard law indeed, unless it can be shown that the notary is bound, at his peril, to find out the places of residence of the indorsers. We have already stated, that these instructions involve the reverse of the propositions submitted by the appellant.

Charles W. Ridgely and *St. Geo. W. Teackle* for the appellees:

The greater portion of the argument on the other side is bestowed upon the discussion of the prayers of the appellant, all of which were rejected by the court; and if those prayers were open for argument in this court, we apprehend that it would be an easy task for us to show that each and all of them were properly rejected. But as no exception was reserved to the rejection of either of those prayers in the court below, we deem it unnecessary, and a useless consumption of the time of this court, to discuss either of those prayers, and will proceed at once to discuss the true and only questions open upon this appeal, in the order in which they are presented in the record.

The first question arises upon the first branch of the instruc-

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tion of the court. Now it will be seen from an examination of this portion of the instruction, that the only proposition of law decided in it is, that if the maker and indorser of a promissory note both reside in the same city, and the note at its maturity is not paid, and the indorser had no notice of the non-payment of the note on the day of its maturity or on the next day thereafter, and no notice of non-payment was left at the residence or place of business of said indorser, that then the said indorser is not responsible for the payment of said note, by reason of his said indorsement, notwithstanding any misdirection given to the notary by the plaintiffs or other persons as to the actual residence of said indorser, unless upon proper and reasonable diligence it was not in the power of the notary to have procured more correct information as to such residence or place of business. Now can any proposition of law be clearer than that announced in this instruction? The point decided is simply that if the jury find the facts stated in the instruction, that then the indorser *is discharged from his liability as indorser*. It does not follow from the instruction, as is erroneously supposed in the argument on the other side, that therefore the plaintiffs are entitled to recover as against the defendant, for it might well be, that if the failure of the notary to find the indorser or his residence or place of business resulted *from the misdirection of the plaintiffs*, that the notary, or the bank, whose agent he was, should not be held responsible for such failure to notify such indorser.

We deem the above sufficient upon this question and proceed to the consideration of the next question which arises upon the second branch of the court's instruction. The question here presented is simply this: *whose agent was the notary for the purposes of demand and notice?* Upon the facts stated in this instruction, *was he the agent of the bank or the agent of the plaintiffs?* Two important facts bearing upon this question are free from all doubt:—1st. That the bank received the note in question from the plaintiffs for collection, *and undertook to collect it*, or have it collected; and 2nd. That the bank, without consultation with, or notice to the plaintiffs, *employed the notary in this case to take the necessary steps to*

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secure the collection of the note, and also employed him as general agent in similar cases. Now upon general principles it seems clear, that the person employed as an agent, is the agent of the person who so employs him, unless specially employed as the agent of another, under a sufficient power for that purpose. And the privity being between the agent and the person employing him, the principal ought to be, and is ordinarily, responsible to third parties for the acts of such agent. This, as a general rule, is conceded in the argument of the appellant's counsel, but they contend that a notary public, being an *official* character, forms an exception to this general rule of law. Now it is unquestionable law, that no protest of an inland bill or promissory note is necessary to bind an indorser—demand and notice are alone sufficient for that purpose, and the notary in this case could have done every thing necessary to bind the indorser, *in his individual capacity as Lemuel Duvall*, as well as in his *official capacity as Lemuel Duvall, notary public*. And the usage proved in this case is not to protest all or any inland bills or notes, but simply to place them, if not paid at maturity, into the hands of a notary, for what purpose the evidence does not state. But, say the learned counsel for the appellants, the bank was bound to have this note protested, in order to secure to the holder the advantage of the *prima facie* proof afforded by a protest under the act of 1837, and if it had failed in this duty which it had undertaken, it would have been liable to the plaintiffs. This argument of our opponents we deem conclusive upon this question: for, we ask, how could the bank be held liable for not securing to the appellees in this case the *prima facie* evidence of a protest to facilitate the plaintiff's recovery upon the note, as against this indorser, and not be held liable to the appellees for not giving notice of demand and non-payment to the indorser, without which all the protest and other evidence would be entirely inefficacious towards the recovery of the amount of the note as against such indorser? There was but one undertaking of the bank, and that was a general one, *viz:* to collect the note, or rather to take the necessary means to do so. And amongst these means, notice of demand and non-

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payment to the indorser is the most necessary and imperative. We deem it only necessary, in support of the foregoing views, to refer the court to the following authorities: *Allen vs. Merchants Bank*, 22 *Wend.*, 215. *Smedes vs. Bank of Utica*, 20 *Johns.*, 371. *Thompson vs. Bank of S. Carolina*, 3 *Hill S. C. Rep.*, 77. *Bank of Utica vs. McKinster*, 11 *Wend.*, 473. *Fabens vs. The Mercantile Bank*, 23 *Pick.*, 330. *The Bank of Utica vs. Smedes, &c.*, 3 *Cowen*, 662.

Now it is not questioned in either of these cases that the notary is the agent of the bank in which the note is deposited for collection, *where the bank is located in the place where the note is payable, and where the parties responsible on the note reside*. Even the chancellor and his nine compeers, in the case in 22 *Wendell*, admit that, but they put their dissenting opinion solely upon the ground, in that case, that the note was payable in another city, and necessarily required the intervention of other agents in such other city, and that such necessity was known to the depositor, and he was to be presumed to acquiesce in the employment of some one *as his agent* other than the bank in which he deposited the note. The opinion of the majority of the court allows no such distinction, but holds the bank that first receives the note for collection liable as agent to the depositor for all negligence, whether of its officers or of other banks or persons employed by them wherever located or residing. It is not necessary for us to go to the extent ruled in this case;—in the case now before this court the bank, the holders of the note, and all the parties responsible upon it, lived in the city of Baltimore. Before leaving this branch of the case, we beg leave to say that all the cases cited by our opponents upon this point will, upon examination, be found to harmonize with the view we have above expressed, if they are examined with reference to the distinction above taken between banks or agents located or residing in the place where the note is payable and the parties responsible upon it reside, and where they are not so located.

In conclusion, we submit that there is no foundation for the objections started by our opponents, either that any question of law has been put by the court to the jury in this case, or

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that any question of facts has been taken from them—this error arises from the counsel of the appellants blending the facts and principles of law stated in their prayers to the court, with the court's instructions—the rejection of those prayers not having been excepted to below, every thing in them is outside of this case.

ECCLESTON, J., delivered the opinion of this court.

The counsel for the appellant insist, that the record presents for our consideration, not only the inquiry whether the court was right in the instructions given to the jury, but also, whether there was not error in refusing to grant the prayers of the appellant; whilst the appellees contend that no exception was taken to the rejection of the prayers but only to the instructions by the court. We are inclined to think the latter is the correct view, but the point need not be decided, because, confining ourselves to the instructions, we find such error in them as to require a reversal of the judgment.

The following is the language of the court: "If the jury believe from the evidence in the cause, that the note offered in evidence was drawn by Wesley F. Walter and indorsed by Edmond T. H. Walter, and that the said indorser and drawer both resided in the city of Baltimore at the time of maturity, and that the note was held by the bank at said time, in said city, for collection on account of the plaintiffs, and shall believe they were then and still are the owners of the same; and if they shall further believe that the said note was not paid at maturity, and that said indorser had no notice of the non-payment thereof, on the day of its maturity or the next day thereafter, and that no notice thereof was left by the plaintiffs or their agent at the residence or place of business of said indorser, then the indorser is not responsible for the payment of said note by reason of his indorsement, although they should believe that the plaintiffs, or their agent duly authorized thereto, as well as other persons in the city of Baltimore, misdirected the notary as to the actual residence of the said indorser, unless they should believe, that upon proper and reasonable diligence it was not in the power of the notary to have pro-

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cured better and correct information as to the residence or place of business of the said indorser.

"If the jury believe the facts stated above as to said note, that the contract and undertaking of the bank with the plaintiffs is to be found by the jury from all the evidence in the cause; and if they shall find from such evidence that the bank undertook, on receiving this note for collection, only to employ a competent and proper person to demand payment of said note at maturity, and give the proper notices of its non-payment, and that they did employ such competent and proper person, and placed the note in his hands in time to have said demand made on the day of the maturity of the note, and such notices given, then the bank is not responsible, although they should believe, that by the negligence or other fault of such person so employed, the note has become lost to the said plaintiffs. But if the jury should believe from the evidence in the cause, that the undertaking of the bank in their receiving said note for collection was, that they would do all that was proper and necessary to be done by the plaintiffs themselves, in order to the security of the interests of the plaintiffs, so far forth as the responsibility of the drawer and indorser was concerned, then the defendant is answerable to the plaintiffs for whatever loss they may find the plaintiffs to have incurred by reason of such negligence, and insufficient action of the bank or the person employed by it as aforesaid."

In the latter part of the opinion and direction thus given by the court, the jury are told, if they believe from the evidence, that in receiving the note for collection the bank undertook to do all that was proper and necessary to be done by the plaintiffs themselves, in order to secure the interests of the plaintiffs so far as the responsibility of the drawer and indorser was concerned, then the bank is answerable to the plaintiffs for any loss they had incurred by reason of negligence and insufficient action of the bank or the person employed by it. "The person employed," here spoken of, means, of course, the notary. But we see no evidence tending to prove any undertaking or agreement whatever, on the part of the bank, which can render it responsible to the plaintiffs for the alleged negligence

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of the notary, or for his insufficient action in the premises, and for want of proof to sustain such responsibility we think there was error in giving the instruction.

The act of 1837, ch. 253, makes protests of inland bills of exchange and promissory notes *prima facie* evidence; and for the purpose of securing the benefit of this law to the owners of such instruments, it is the duty of the banks receiving them for collection to place them in the hands of a notary that they may be protested in due time, when necessary. And we think, that in this State, when, in the ordinary course of business, without any special agreement on the subject, a note or bill is received by a bank for collection, which is in due time delivered by it to the notary usually employed in such matters by the bank, so that the necessary demand, protest and notices may be made and given by him, the bank will not be answerable in case of loss resulting from a failure of the notary to perform his duty.

The responsibility of banks receiving notes for collection, where they have employed other banks or agents, has been carried further in New York than in some other States of the Union. But even there, in *Smedes vs. Utica Bank*, 20 *Johns. Rep.*, 384, where the bank was held answerable on account of having employed a person to make demand and give the notice, who was not a competent agent, the court say: "If the note had been delivered to a notary it would present a different case. Notaries are officers appointed by the State; confidence is placed in them by the government. This may be evidence sufficient to justify an agent in committing to them business relating to their offices, although in point of fact it might subsequently appear, they did not possess the necessary qualifications." See also *Story on Agency*, *sec.* 201. *Pawson vs. Donnell*, 1 *G. & J.*, 147. *Jackson vs. Union Bank*, 6 *H. & J.*, 150. *Fabens vs. The Mercantile Bank*, 23 *Pick.*, 330. *Dorchester Bank vs. New England Bank*, 1 *Cush.*, 177, 188. *East Haddam Bank vs. Scovil*, 12 *Conn.*, 303. *Bellemire vs. Bank of the United States.* 4 *Wharton*, 105, and 1 *Miles*, 173. *Baldwin vs. Bank of Louisiana*, 1 *Louisiana Annual Rep.*, 13. *Hyde & Goodrich vs. Planters*

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Bank of Miss., 17 *Louisiana, Rep.*, 560. *Tiernan & others, vs. Commercial Bank of Natchez*, 7 *How. Miss. Rep.*, 648. *Angel & Ames on Corp.*, 186.

Judgment reversed and procedendo ordered.

GEORGE BASSETT and ELIZABETH BASSETT, his Wife, *vs.* JOHN A. MILLER.

A widow gave up the right to administer upon the estate of her husband, in consideration of receiving from the party in whose favor she relinquished, and who was a stranger to the estate, all the commissions except $100, and such party was appointed administrator by the orphans court. HELD, that this contract is valid and binding.

APPEAL from the Circuit Court for Washington county.

Assumpsit by the appellants against the appellee. The first and second counts in the declaration allege a contract between the plaintiff, Elizabeth, while sole and the widow of Mahlon Ely, deceased, that if she, being entitled to administer on the estate of her deceased husband, would relinquish her right and permit the defendant to administer, he would pay over to her all the net commissions except the sum of $100; that she did relinquish and that Miller was appointed by the orphans court administrator, and the commissions allowed him were $1982.78, which sum, less the $100, was due the plaintiffs by the contract, but that Miller refused to pay it. To these counts the defendant demurred, and the court ruled the demurrer good. The other counts were in *indebitatus assumpsit*, to which the defendant pleaded *non assumpsit*.

Exception. The plaintiffs proved the contract as stated in the declaration, and that defendant administered and received the sum of $1982.78 as commissions. The defendant then prayed the court to instruct the jury, that if they believe from the evidence that the money claimed by the plaintiffs, and for which this suit is brought, is alleged to be due on a contract or promise of defendant to the plaintiff, Elizabeth, that if she

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would relinquish her right to take out letters of administration on the estate of Mahlon Ely, her husband, and the orphans court should, in consequence, grant letters to him, that he, the defendant, would, in consequence of such relinquishment, pay over to her all the commissions allowed him by the orphans court for his administration of said estate, with the exception of $100, that then such contract or promise is against the policy of the law and void, and the plaintiffs are not entitled to recover.

This prayer the court (PERRY, J.) granted, and to this ruling the plaintiffs excepted; and the verdict and judgment being against them, appealed.

The cause was argued before ECCLESTON, TUCK and MASON, J.

Thomas Harbine for the appellants, argued, that there can be no pretence that Mrs. Bassett was actuated by any improper motive or intent in making the contract with Miller, nor can the most rigid construction of the whole transaction impute to her any the least want of moral consideration, or disregard of the rights of third persons or the public. But upon the contrary, it would appear that she was moved by the highest moral and beneficial considerations, *viz.*, that of obtaining, by the relinquishment of a valuable legal right, the means of support for her helpless children, and at the same time bringing to the administration of the estate one whom she *supposed* to be honest, and at any rate much more capable than herself. Such being the relation of Mrs. Bassett to this subject, I contend there has been no law, statute or common, violated, nor would any public policy be contravened by the enforcement of this contract. That this contract is not, in fact, of the character or species which are denounced by the law as being against policy. And a contract, before it can be regarded by courts as against policy, must appear plainly to contravene some public right or interest. 1 *H. & G.*, 484, *Owings vs. Owings*. *Chitty on Cont.*, 575, 572. *Story on Sales, secs.* 489, 490. 9 *Eng. C. L. Rep.*, 391, *Richardson vs. Mellish.*

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Ibid., 444, *Davis vs. The Bank of England.* 44 *Eng. C. L. Rep.*, 78, *The Fishmongers Co. vs. Robertson.* 5 *Term Rep.*, 639, *Hutton vs. Lewis, et al.* *Act of* 1798, *ch.* 101, *sub-ch.* 5. *Byles on Bills*, 104. *Cro. Jac.*, 612, *Parker vs. Brown.*

William Price for the appellee, argued, that the attempt in this case was to farm out or delegate the right to administration, and all contracts intended to effect such an object are against the policy of the law and void. 1 *H. & G.*, 492, *Owings vs. Owings.* 8 *Gill*, 286, *Ex-parte Young.* *Act of* 1798, *ch.* 101, *sub-ch.* 14, *sec.* 1. 4 *Md. Ch. Dec.*, 368, *Brown vs. Stewart.*

MASON, J., delivered the opinion of this court.

So far from the case of *Owings vs. Owings*, 1 *Har. & Gill*, 484, being an authority against the validity of the contract declared upon in this case, the court expressly refrain from deciding the point. The question upon which that action was defeated was not that the contract was not valid and binding, but that the plaintiff, who brought the suit, was not the proper party to maintain the action. It is true the court say in their opinion, "it is not consistent with the policy of the law to encourage such transfers, as, in bad hands, the practice might lead to gross violations of trusts and the most pernicious consequences." While we are willing to concede the propriety of this suggestion, we do not admit that this *dictum* is sufficient to control the court in the case now before them, or to constitute the rule of law to govern us in subsequent cases. The reason assigned why such transfers are against the policy of the law, namely, because, "in bad hands, the practice might lead to gross violations of trusts," &c., has not the force which it is supposed to have, for the reason, that all such contracts or transfers with parties not preferred by law must be subject to the sanction and confirmation of the orphans court; and it is not to be supposed that that court would assent to the appointment of an unworthy representative in order merely to carry out such an arrangement.

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While such contracts should not be *encouraged*, it is far better, in view of public policy and sound morality, that they should be sustained, than that conduct should be tolerated, by this court, by which solemn engagements may be repudiated, and fraud and deception perpetrated with impunity.

Judgment reversed and procedendo awarded.

MARY WILDERMAN, EXC'X of JOHN WILDERMAN, *vs.* THE MAYOR & CITY COUNCIL OF BALTIMORE.

A devise to the city of Baltimore, in trust, "for the relief and support of the indigent and necessitous poor persons who may, from time to time, reside within the limits, as now known, of the twelfth ward of said city of Baltimore," is void as being too vague and indefinite, and the property vests in the next of kin of the testator, or his residuary devisees.

The right of the residuary devisees vested *immediately* upon the death of the testator, and it is not in the power of the legislature, by the subsequent act of 1842, ch. 86, to divest the vested rights acquired under the will, by giving that act a *retrospective* operation.

APPEAL from the Court of Common Pleas for Baltimore city.

Covenant by the appellees against the appellant to recover arrears of ground-rent due under a lease for ninety-nine years, renewable forever, executed by Henry Peters to John Wilderman; the rent reserved thereby having been devised by said Peters to the plaintiffs. Plea, *nil debet*.

The case was submitted to the court below upon an agreed statement of facts. The question presented is, as to the validity of the following devise in the will of Henry Peters, executed on the 26th of December 1836, and admitted to probate on the 20th of February 1838. The testator, after enumerating certain annuities, says: "I give, devise and bequeath to the Mayor and City Council of Baltimore and their assigns, in trust and special confidence that the said annuities, amounting aggregately to the said sum of one hundred and five dollars

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and fifty cents, shall annually forever hereafter be distributed, appropriated and applied, under the direction of said corporation, to the relief and support of the indigent and necessitous poor persons who may, from time to time, reside within the limits, as now known, of the twelfth ward of the said city of Baltimore." The plaintiffs claimed and demanded the arrears of rent sued for in this case under this devise, but the defendant refused to pay the same by reason of notice from the residuary devisees of said Peters that they claimed the same, and that the aforesaid devise is null and void. It was also agreed that a *pro forma* judgment should be rendered in favor of the plaintiffs from which the defendant should appeal, and this was accordingly done.

The cause was argued before LE GRAND, C. J., ECCLESTON, TUCK and MASON, J.

William F. Frick for the appellant.

The validity of this devise can hardly be deemed an open question in this State after the decisions of this court in the cases of *Trippe vs. Frazier*, 4 *H. & J.*, 446. *Dashiell vs. The Attorney General*, 5 *H. & J.*, 392, and the same case in 6 *H. & J.*, 1.

1. It is well settled, (5 *H. & J.*, 401, 402,) that the *Statute of* 43 *Elizabeth* is not in force in Maryland. The devise can therefore receive no aid from the provisions of that statute, or of any of the numerous adjudications upon it in England, and the other States of this Union.

In any point of view the devise is void *at law*, and could only be made good by the intervention of a court of equity. But independent of the *Statute of* 43 *Elizabeth*, there is no jurisdiction in chancery to set up a charity, which is so vague and indefinite in its provisions, that the *cestui que trusts* can only be designated by the exercise of an arbitrary discretion in the trustee. The doctrine of *Cy Pres* has never been adopted in this country, even in those States in which the *Statute of* 43 *Elizabeth* has been either directly re-enacted, or forms, in its spirit, part of their common law.

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The Supreme Court of the United States, in the case of the *Baptist Association vs. Hart's Ex'rs*, 4 *Wheat.*, 1, held, that the *entire* jurisdiction of the chancery court over charitable uses grew out of the *Statute of* 43 *Elizabeth*. Whatever doubts may have since arisen about the correctness of this opinion, it is still clear, on all the authorities, that "*a court of chancery in this country, independently of the Statute of Elizabeth, cannot support a devise to charitable uses where no legal interest is vested, on account of the too vague description of those who are to take.*"

This state of things presents an inherent difficulty, which can *only* be removed by the aid of the *Statute of* 43 *Elizabeth*, and the application of the equitable doctrine of *Cy Pres*; neither of which is in force in Maryland.

In *Dashiell vs. The Attorney General*, 5 *H. & J.*, 392, the devise was "to the poor children belonging to the congregation of St. Peter's Protestant Episcopal Church, in the city of Baltimore." The court say, (page 399,) "without the aid of the statute the *cestui que trust* can only be brought into being by the ascertainment and designation of the trustee; and there being no such ascertainment and designation, though certain *selections* have been made, no persons exist having in themselves a vested equitable interest which they are capable of asserting in a court of equity. The bequest is therefore too vague and indefinite, &c., &c., and is void, and the subject of the trust, being undisposed of, the benefit of it results to the next of kin."

In *Trippe vs. Frazier & Wife*, 4 *H. & J.*, 446, the bequest was "*to the real distressed private poor of Talbot county;*" and was held to be void, owing "to the impracticability of correctly ascertaining the objects of the bequest."

2nd. A still further insurmountable objection to this devise, even if it were free from the objection last urged, is, that it is a perpetuity, created for the benefit of the poor persons who should, *from time to time*, reside within the limits, &c., of the twelfth ward. Even if, at the time the devise took effect, the *cestui que trusts* were sufficiently capable in equity of being ascertained and designated, "*The poor, &c., &c., of the*

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twelfth ward" are not a body corporate capable of taking in succession the annual income *forever* devised to them by the testator. In *Dashiell vs. Attorney General*, 6 *H. & J.*, 1, the devise was "to the trustees of Hillsborough school, to be by them applied towards feeding, clothing and educating the poor children of Caroline county, which attend the poor or charity school at Hillsborough." The court say, (page 8,) "the interposition of trustees does not make the bequest good, &c. The fund is a perpetual fund, intended, not only for the poor children who, at the death of the testator, attended Hillsborough school, but for such as should in succession attend that school, &c. *The poor children of Caroline county which attend Hillsborough school* are not a body corporate and cannot take in succession; and the bequest, if otherwise good, must fall as soon as the first objects of the testator's beneficence ceased to attend the school."

It seems obvious, that whatever new lights may recently have been thrown upon the extent and character of the jurisdiction in chancery over charitable uses prior to the Statute of Elizabeth, the present case cannot be brought within the saving benefits of that jurisdiction, except as amplified and extended by the statute.

3rd. Neither is it aided by the act of Assembly of 1842, ch. 86. This act was passed by reason of the admitted incompetency of the city, as trustee, to take the devise in question. As a body corporate, chartered for specific limited purposes, it could not be seized of a trust foreign to the ends of its charter. It is only by virtue of the provisions of the statute of Elizabeth that a corporation can hold in trust for charitable uses when its charter confers no such power. The statute not being in force in Maryland the principle remains as at common law. 2 *Bac. Abr., title Corporations*, 2. The title of the act of 1842 sufficiently indicates the legislative interpretation of this question. It professes to confer *additional* powers upon the Mayor and City Council of Baltimore. Looking then at this act in its true purview, it can only be construed as conferring on the city corporation the power to receive and hold in trust, and to control for the purposes of such trust all prop-

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erty bestowed for *valid* corporate, educational and charitable uses. In other words it only enables the city to act as trustee in all cases where, without the act, equity would support the bequest by the appointment of competent trustees to execute it. If this be not so, why was it necessary to provide for the case of gifts for any of their *corporate* purposes? But the act does not profess to give validity to such charities, as the courts of equity in the State would, on general principles refuse to set up, by reason of their vagueness and uncertainty, their creation of perpetuities, their repugnance to State or public policy, or otherwise. It can hardly be said that this act was intended, *quoad* the city of Baltimore, to re-enact the provisions of the *Statute of* 43 *Elizabeth;* and to confine the benefits, if such they be, of that statute, to cases arising within the city limits. And unless some such construction be put upon its language, it cannot be taken to cure the inherent defects in the devise now in question.

But even if it could be construed to give validity to such devises for the future, it is clear it cannot do so *retrospectively.* If, without the act, the devise could not take effect, the subject matter of the trust vested, at the death of the testator, in his residuary devisees. Their rights thus acquired could not be divested by any subsequent legislative act. "No State government can be presumed to possess the transcendental sovereignty to take away vested rights of property." *Story's Com. on the Const., sec.* 712.

No counsel appeared for the appellees.

Mason, J., delivered the opinion of this court.

The question presented upon this appeal is whether the following devise can be supported? It is to the city of Baltimore in trust for "the relief and support of the indigent and necessitous poor persons, who may, from time to time, reside within the limits, as now known, of the twelfth ward of said city of Baltimore."

Since the decisions of this court in the cases of *Trippe vs. Frazier*, 4 *Harr. & Johns.*, 446; and *Dashiell vs. Attorney General*, 5 *H. & J.*, 392; and *Same vs. Same*, 6 *H. & J.*, 1;

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the validity of the devise now before us can hardly be regarded as an open question. It is too vague and indefinite, and too difficult of being correctly ascertained, to be enforced; and is therefore void, and in all such cases the subject of the trust must vest in the next of kin of the testator, or his residuary devisees.

In the present instance the testator died, and the will took effect in the year 1838. The rights of the residuary devisees thereby became immediately vested, and it was not in the power of the Legislature, by giving the act of 1842, chap. 86, such a retrospective operation, so as to divest the vested rights acquired under the will. See the case recently decided by *Judge Giles* in the Circuit Court of Maryland reported in *Volume 4th, page 526, American Law Register*, and also to the *Opinion of Chief Justice Taney*, therein referred to.

We reverse the *pro forma* judgment, entered in the court below, and direct judgment to be entered for the appellant.

Judgment reversed,
but no procedendo.

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ACTS OF CONGRESS.

1. The proceedings of a county court in Virginia, directing a will to be recorded and granting certificate to the executor to obtain probate thereof, are *judicial acts* to be authenticated under the act of Congress of 1790, ch. 38, and a copy of a will in a transcript of such proceedings so authenticated, is admissible in evidence in the courts of this State. *Case vs McGee*, 9.

2. A certificate of the clerk, certifying that "the foregoing is a true transcript from the records of the court" of which he was clerk, is sufficient, it being a *substantial compliance* with the act of Congress. *Ib.*

3. The act of Congress of 1804, ch. 56, extending the provisions of the act of 1790, ch. 11, to the records and courts of the respective *Territories* of the United States, is a constitutional exercise of the legislative power of Congress. *Hughes vs. Davis*, 271.

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ADMINISTRATION—ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ORPHANS COURT.

ADMISSIONS AND CONFESSIONS.

1. Admissions acted on by others, whether true or false, are conclusive against the party making them, in all cases between him and the party whose conduct he has thus influenced. *McClellan & Wife, vs. Kennedy, et al.*, 230.

AGENCY—AGENT.

1. Where an agency created and defined by a written instrument is delegated to *three* it cannot be executed by *one*, and the agents cannot delegate their authority to another. *White vs. Davidson et al.*, 169.
2. Where a party without authority assumes to act as agent for others, the latter are not bound, unless on full knowledge they recognised and adopted his acts. *Ib.*
3. If a partner without authority therefor, agrees to indemnify a surety on an injunction bond in a suit prosecuted for the benefit of the firm of which he is a member, his act does not bind the firm unless his co-partners subsequently acquiesced therein. *Ib.*

See ATTORNEY AND CLIENT, 1, 2.

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APPEAL.

1. No appeal lies to this court from an order of an orphans court revoking an indenture of apprenticeship under the act of 1842, ch. 25, that act having provided an appeal in such cases to the county court, *Lammott vs. Maulsby*, 5.
2. Where an inferior court exercises a special limited jurisdiction conferred by statute, no appeal from its decisions in such cases lies to this court unless expressly given by the statute. *Ib.*
3. Under the act of 1834, ch. 233, sec. 11, the court has a *discretion* as to what time the exceptions shall be prepared or signed, provided they are completed prior to the verdict, and the exercise of such discretion is not a subject of revision on appeal. *Robeson vs. Carson*, 208.
4. In cases in insolvency, the right of appeal is given only to persons *aggrieved* by the decision of the court below, and the *trustee* has no right to object to the claims of creditors, and to appeal from an order allowing such claims, where the creditors themselves acquiesce. *Salmon, trustee of Boon vs. Pierson*, 297.

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APPEAL—*Continued.*

5. He may appeal where the decision complained of affects the interests of *all the creditors* by diminishing the estate out of which they are to be paid, or where he is defeated in attempts to augment that fund by the recovery of property or money which he thinks belongs to the creditors. *Ib.*
6. If he has an interest as trustee in reference to his allowance for commissions and expenses, or as a creditor of the insolvent, he has an equal right, with others, to object to the distribution and to appeal. *Ib.*
7. A decree dismissing so much of a bill as related to or sought to recover from the defendant as respects a certain note, is a final adjudication of that particular question unless appealed from in due time, and after the time for an appeal has passed the question cannot be revived by a petition for a rehearing, or by the fact that in the auditor's account the note was charged to the defendant, to which exceptions were filed and overruled, and from the order over-ruling them an appeal was taken in due time. *Hitch vs. Davis*, 524.

APPEARANCE.

See PRACTICE, 4 to 7.

APPRENTICE.

1. Under the act of 1842. ch. 25, the orphans court may, upon suggestion, in writing, made by counsel, without making the apprentice a formal party, take proof and set aside his indentures. *Lammott vs. Maulsby*, 5.

ARBITRATION—AWARD.

1. Mistakes committed by the arbitrators in drawing incorrect inferences or forming erroneous judgments or conclusions from facts, will not vitiate their award. *Roloson vs. Carson*, 208.
2. A mistake that will vitiate an award must be gross and manifest, and of some fact by which the arbitrators were deceived and misled. *Ib.*
3. The courts have by a long course of decisions manifested a strong inclination to sustain the judgments pronounced by arbitrators. *Ib.*
4. It is not necessary that the parties should have *notice* of or be present at the meeting of the arbitrators at which the award is made up and signed. *Ib.*
5. Arbitrators, like jurors, have the privilege of consultation in private for the purpose of making their award. *Ib.*
6. A prayer that an award is void because the arbitrators, without previous notice to, and in the absence of, the other, read an *ex-parte* affidavit of one of the parties, "though the jury believe it had *little or no* influence on the minds of the arbitrators," is defective, because it would have justified the jury in vacating the award for what they believed had *no effect* upon the decision. *Ib.*

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ARBITRATION—AWARD—*Continued.*

7. A more liberal and reasonable interpretation of awards is now adopted than formerly; every reasonable intendment will be made in their favor, and a construction given to them that will support them, if possible, without violating the rules adopted for the construction of written instruments. *Ib.*
8. A prayer that an award was void because of improper conduct of the arbitrators, without leaving to the jury to find any facts constituting the misconduct, is erroneous. *Ib.*
9. A prayer that an award is void because not in accordance with the submission as proved by *one witness* is defective, there being *other witnesses* who testified in regard to the terms of the submission. *Ib.*
10. Where a case is referred under the act of 1778, ch. 21, and an award made by the referee, no reasons are good on *caveat* to such an award except those specified in the 9th section of that act, or those apparent on the face of the award. *Ing, et al., vs. The State, use of Lewis & McCoy*, 287.
10. Where a cause is referred under the act of Assembly, all matters are within the submission which could be introduced by *amendment* of the pleadings, and the reference *waives* the necessity for averring such matters in the declaration or other pleadings. *Ib.*
11. The referee has nothing to do with the particular issue joined in court, nor is it of any importance whether any issue be joined previous to the reference; the reference is a reference of the *whole case* to be tried on its *merits*. *Ib.*

ASSIGNMENT—ASSIGNOR—ASSIGNEE.

1. To make an assignment valid at law the thing which is the subject of it must have an actual or potential existence at the time of the grant or assignment. *Hamilton and Robinson vs. Rogers*, 301.
2. The mortgagee of a term, after forfeiture, has the whole legal estate therein, and is liable on the *real covenants* in the lease whether he becomes possessed of or occupies the premises *in fact* or not. *Mayhew vs. Hardesty*, 479.
3. To make a party liable under the covenants as assignee, he must be the assignee of the *entire term*, for otherwise he is but a mere *sublessee*, and as such not liable under the covenants, *Ib.*
4. An interest in a term for more than seven years cannot be transferred or assigned, except in the mode prescribed by our registry laws, and no acts *in pais* short of a deed, duly executed and recorded, can transfer such interest. *Ib.*
5. A bond of conveyance executed by a lessee to the purchaser of the lease, does not make such purchaser the *legal assignee* of the *entire term*, and he is not therefore liable under the covenants in the lease. *Ib.*

See JUDGMENT, &c., 6.

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ASSIGNMENTS IN FAVOR OF CREDITORS.

1. The validity of a deed of trust for the benefit of creditors must be determined by the deed *itself*, without reference to extrinsic facts. *Malcolm, Trustee of Sprigg & Meseke vs. Hodges*, 418.
2. An *implied* reservation of the surplus, after paying the releasing or preferred creditors, to the grantor, avoids the deed equally with an *express* reservation, and the court cannot look outside of the deed to ascertain whether there will be a surplus or not. *Ib.*
3. Such an assignment, to be valid, must convey all the property of the debtor, and *in terms* dedicate the whole for the benefit of his creditors, subject to such preferences as may be declared in the deed. *Ib.*
4. A deed which makes no disposition of the surplus, after paying the releasing creditors, is *void*, because there is an implied reservation of such surplus to the grantor. *Ib.*

ASSUMPSIT.

1. Where a contract has been fully executed and nothing remains to be done but the payment of the money, the amount due may be recovered in *indebitatus assumpsit*, and in such a case it is not necessary to declare upon or set out the special agreement. *Jenkins vs. Long & Byrne*, 132.
2. A party who is neither a land broker nor had been employed by the defendant, has no right of action for services rendered in the sale of the defendant's land. *Canby vs. Frick*, 163.

See CONTRACTS, &c., 3, 4, 5, 7.

ATTACHMENT.

1. Funds in the hands of the register of the city of Baltimore due by the city for the salaries of city officers, are not, upon grounds of *public policy and convenience*, liable to be *attached* by the creditors of such officers. *Mayor & C. C. of Balto., Garn. of Brashears vs. Root*, 95.
2. The act of 1825, ch. 114, sec. 2, authorising attachments on judgments to be laid in the hands of any "person or persons whatever, *corporate or sole*," does not include *municipal corporations;* they are *excepted* by reason and necessity. *Ib.*
3. The fact that the officer whose salary was attached could have *sued the city* therefor, does not authorize his creditors to *attach* the claim. *Ib.*
4. Because a claimant may sue, it does not follow that his creditor can *attach* the claim in *every case*, although as a *general rule* it may be so. *Ib.*
5. A pending attachment may be pleaded in *abatement* to a suit against the garnishee by the defendant in the attachment, but to constitute a *bar* to such a suit there must be judgment of condemnation followed by *execution executed*, or *payment* or *satisfaction*. *Brown vs. Somerville*, 444.
6. The act of 1715, ch. 40, sec. 7, places *credits* upon the same footing as *goods and chattels*, and permits the garnishee to plead the attach-

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ATTACHMENT—*Continued.*

ment in *bar* only when it has proceeded to judgment *and execution had and made*. *Ib.*

7. The defendant in the attachment may sue the garnishee on the attached *chose* at any time before payment of the judgment of condemnation, or execution executed thereon, and recover, unless the garnishee pleads the pending attachment in *abatement*. *Ib.*

8. The judgment in attachment does not *extinguish* the garnishee's *debt* to the defendant; the debt is attached as something belonging to the defendant and not as a debt due by the garnishee to the plaintiff, and the defendant has an interest in having that credit applied to the payment in whole or *pro tanto* of his debt to the plaintiff. *Ib.*

9. An attachment without satisfaction will not, of itself, prevent the plaintiff in the attachment from resorting to his original debtor. *Ib.*

10. A judgment of condemnation was rendered against a garnishee for $10,000, and before execution issued thereon he was sued by the holder of a promissory note for $322.19, which was one of the *attached choses*, he being the maker thereof. Pending this suit he *purchased* the judgment from the plaintiff in the attachment for 2300. HELD:

That this purchase was no defence to the suit, because the *whole debt* was not paid; as between the plaintiff in the attachment and the garnishee the judgment was closed, but the defendant in the attachment had an interest in having the *whole debt* paid, and the garnishee occupies no better position than if any *other person* had purchased the judgment who could have compelled the garnishee to pay the whole debt, or after exhausting his remedy on the judgment have resorted to the defendant in the attachment for the balance. *Ib.*

11. The attachment process has always been strictly construed, and required to be pursued according to the statute. *Ib.*

12. Materials for building a bridge, delivered by the contractor at the place designated by the bridge company, accepted and paid for by them in pursuance of the contract under which the bridge was to be built, are, upon the abandonment of the work by the contractor, (which contingency was provided for in the contract,) the *absolute property* of the company, and are not liable to attachment by the creditors of the contractor. *Pusey vs. Potomac Bridge Co.*, 470.

ATTORNEY AND CLIENT.

1. The employment of an attorney to prosecute an injunction suit does not confer on him, *ex necessitate*, the right to bind his clients to indemnify a third party who becomes surety on the injunction bond. *White vs. Davidson, et al.*, 169.

2. An attorney *as such* may submit a cause to arbitration, and if he makes a compromise *bona fide* which works no considerable hardship the courts will be slow to disturb it, and will refuse when it has been acquiesced in with full knowledge of the facts. *Ib.*

3 Where a judgment in favor of the State is paid by a surety, there is

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ATTORNEY AND CLIENT—*Continued.*

no statute which authorises an assignment thereof to be made by the State, or by any officer or agent acting for the State, to such surety, and it cannot be done, under the act of 1763, ch. 23, sec. 8, by the *attorney* for the State. *Peacock, Assignee of the State, vs. Pembroke*, 348.

4. Under the acts of Assembly of this State payment to the attorney of the State is no satisfaction of the judgment in favor of the State, and his release or receipt is no discharge of it. *Ib.*

BALTIMORE CITY.

See STREETS, &c., 1 to 5.
CORPORATIONS.

BANKS.

1. In this State when a note or bill is received in the ordinary course of business, without any special agreement on the subject, by a bank for collection, and the bank in due time delivers it to the notary usually employed by it in such matters, so that the necessary demand, protest and notices may be made and given, the bank will not be answerable for loss resulting from the failure of the notary to perform his duty. *Citizens Bank vs. Howell*, 530.
2. The act of 1837, ch. 253, makes protests of inland bills and promissory notes *prima facie* evidence, and to secure the benefit of this law to the owners of such instruments, it is the duty of the banks receiving them for collection to place them in the hands of a notary that they may be protested in due time when necessary. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A contractor mortgaged the lots, on which he was about to erect certain houses, to defendant, to secure advances for the purchase of materials for their erection, to be made by the latter in instalments as the houses progressed to completion. He then gave an order upon defendant, in favor of plaintiffs, for bricks to be furnished by them, payable out of these advances in four instalments, the third of which was payable when the houses were plastered, and the balance when they were *completed by the contractor.* Defendant accepted this order on condition, that when the houses were plastered he was to give his note for the balance then due the plaintiffs, at six months, "*for their accommodation.*" The bricks were furnished to the contractor upon the basis of this order and acceptance. The first two instalments were duly paid, and when the houses were plastered, the instalment then due, instead of being paid by a note at six months, was paid in cash, deducting five *per cent.* Defendant then for the balance tendered his note at six months, *provided* plaintiffs would sign a receipt that it was given for their *accommodation*, and that they were to pay it *unless the houses were completed by the contractor.* This they refused to do and sued upon the *acceptance.* The contractor never did complete the houses. HELD:

That by this acceptance the note to be given was a note for the *accommodation* of the plaintiffs, in the legal and technical sense

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BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

of that word, to become the *real* note of defendant only in case the houses were completed by the contractor, and this contingency never having occurred, the plaintiff could not recover. *Cline & Francis, vs. Miller*, 274.

2. A payee may refuse a conditional or qualified acceptance, yet if he *takes* such an one when offered, he can only claim payment accord- to the condition or qualification. *Ib.*
3. As between the original parties to a bill or note, the total or *partial* want or failure of consideration may be relied on as a defence, and a *partial* failure avoids the note only *pro tanto*. *Ib.*
4. In this State when a note or bill is received in the ordinary course of business, without any special agreement on the subject, by a bank for collection, and the bank in due time delivers it to the notary usually employed by it in such matters, so that the necessary demand, protest and notices may be made and given, the bank will not be answerable for loss resulting from the failure of the notary to perform his duty. *Citizens Bank vs. Howell*, 530.
5. The act of 1837, ch. 253, makes protests of inland bills and promissory notes *prima facie* evidence, and to secure the benefit of this law to the owners of such instruments it is the duty of the banks receiving them for collection to place them in the hands of a notary that they may be protested in due time when necessary. *Ib.*

BOND.

1. The general plea of *non est factum* imposes on the plaintiff the *onus* of proving both the execution and *delivery* of the bond. *Edelin vs. Sanders*, 118.
2. Proof of execution and possession is *prima facie* evidence of delivery, and in the absence of all proof on the other side will entitle the obligee to a verdict. *Ib.*
3. The *seal* imports a consideration and the latter *as such* cannot be inquired into under the plea of *non est factum*, but the obligee may give in evidence anything which goes to show the bond was originally void at common law, as lunacy, fraud, coverture; or that it has become void subsequent to execution and before suit, as by *erasure, alteration*, &c. *Ib.*
4. When there is nothing *in the record to show it*, this court cannot *assume* that a bond was erased or altered after delivery, and can have no *judicial knowledge* of the fact if it existed. *Ib.*
5. If upon inspection the bond appeared to have been altered, the fact should be noticed in the exception, either by agreement or by asking an *expert* in handwriting his opinion as to its appearance. *Ib.*
6. Where there is proof that a bond has been *altered*, facts tending to show *fraud* on the part of the obligee, by showing his relations and dealings with the obligor, are admissible under the plea of *non est factum*. *Ib.*
7. The name of the obligee is a *material* part of a bond, and as a general principle delivery in *blank* is an insufficient delivery, unless recognized after the blank is filled up *Ib.*

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BOND—*Continued.*

8. In case of bonds given to the State the uniform practice in this State has been to institute the suit in the name of the State, and to endorse on the writ and declaration the names of the parties for whose use and benefit it is prosecuted. *Ing, et al., vs. State, use of Lewis & McCoy*, 287.
9. In such cases, though the judgment is always entered up for the amount of the damages laid in the declaration, yet it is accompanied by a release, (which constitutes a part of it,) on payment of the sum awarded by the jury, court or referee, as the case may be. *Ib.*
10. The party for whose use the suit on such a bond is instituted is in fact regarded as the *real* plaintiff, though the State, technically speaking, is so. *Ib.*
11. It is incumbent on the party suing on such a bond to show that he has an interest in it before he can recover in a regular trial prosecuted to verdict. *Ib.*

BROKERS.

See ASSUMPSIT, 2.

CERTIFICATE.

1. A certificate of the clerk of a court in another State, that the "foregoing is a true transcript from the records of the court" of which he was clerk, is sufficient, it being a *substantial compliance* with the act of Congress of 1790, ch. 38. *Case vs. McGee*, 9.

See EJECTMENT, &c., 2, 3.

CHANCERY SALES.

See PRACTICE IN EQUITY, 14, 20.

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See SEQUESTRATION, 3 to 7.

COMMINGLING OF PROPERTY.

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COMPOSITION WITH CREDITORS.

1. Where a debtor sets up an agreement with his creditor to compound his claim by paying a certain sum in cash or notes at a specified time, as a bar to the creditor's claim, he must show compliance with his part of the agreement either by paying, or offering to pay, in conformity with its terms, before he can rely upon the composition. *Flack vs. Garland*, 188.

COMPROMISES OF SUITS.

1. The *compromise of a suit* to vacate a deed *advisedly made*, by which the grantor agreed to take back her property and also all that of the grantee, and to pay certain specified debts of the grantee, is a sufficient consideration to support her assumption of such debts, and the court will not look to the circumstances affecting the original suit. *McClellan & Wife, vs. Kennedy, et al.*, 230.
2. Compromises, if otherwise unobjectionable, are binding, and the *right* will not prevail against the agreement of the parties. *Ib.*

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CONSIDERATION.

See COMPROMISES OF SUITS, 1, 2.

CONSTITUTIONAL LAW.

1. The 10th sec. of the 4th art. of the constitution giving to the Court of Common Pleas "jurisdiction in all cases where the *debt or damage* claimed shall be over $100, and shall not exceed $500," does not confer upon that court any original jurisdiction in actions of *replevin*. *Blimline vs. Cohen*, 147.
2. The acts of Assembly imposing duties upon the judges of the Court of Appeals in their *individual capacities* have not been abrogated by the new constitution, but apply in the same manner to the members of the present as to those of the former court. *Ex-parte O'Neill*, 227.
3. The power to hear and decide upon cases of *habeas corpus* may be claimed by the individual judges of the Court of Appeals, under that clause of the constitution which makes them "conservators of the peace throughout the State." *Ib.*
4. The act of Congress of 1804, ch. 56, extending the provisions of the act of 1790, ch. 11, to the records and courts of the respective *Territories* of the United States, is a constitutional exercise of the legislative power of Congress. *Hughes vs. Davis*, 271.
5. The act of 1853, ch. 123, is a legitimate exercise by the legislature of the power conferred by the 23rd sec. of the 4th art. of the constitution, in reference to the removal to the counties of the cases in the Court of Chancery. *Brown vs. Gilmor's Exc'rs, et al.*, 322.
6. Where a particular devise to the Mayor and City Council of Baltimore was void for uncertainty, the right of the next of kin or residuary devisees vested *immediately* upon the death of the testator, and it is not in the power of the legislature, by the subsequent act of 1842, ch. 86, to divest the vested rights acquired under the will, by giving that act a *retrospective* operation. *Wilderman vs. Mayor & City Council of Baltimore*, 551.

CONSTRUCTION OF ACTS AND STATUTES.

1. The act of 1729, ch. 20, in so far as it permits a party to prove his own accounts by oath or affirmation, is in derogation of the common law, and like all such legislation, is to be construed *strictly*. *Warner vs. Fowler*, 25.
2. An account sworn to under this act, must show *affirmatively* upon its face that it was made "*within twelve months after the first article therein charged shall become due*," or else the oath is *extra-judicial*, and cannot constitute *perjury* if false. *Ib.*
3. The 15th sec. of the act of 1729, ch. 20, making it perjury to swear falsely to "*any account*," before any justice, is *repealed* by the 8th sec. of the act of 1785, ch. 46. *Ib.*
4. The act of 1720, ch. 24, which prohibits a suit upon a testamentary or administration bond, before a return of *non est* to a *capias* against the executor or administrator, is a *remedial statute*, and, as such, is to be *liberally* construed; its design is to make the principal pay instead of the surety. *State, use of Sprigg, vs. Jones, et al.*, 88.

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CONSTRUCTION OF ACTS AND STATUTES—*Continued.*

5. Under this act an executor may *voluntarily* appear to the *capias* at any time during the *same term*, though after the return of *non est*, and thus prevent a suit on his bond. *Ib.*
6. The act of 1825, ch. 114, sec. 2, authorising attachments on judgments to be laid in the hands of any "person or persons whatever, *corporate or sole*," does not include *municipal corporations;* they are *excepted* by reason and necessity. *Mayor & C. C. of Balto., Garn. of Brashears, vs. Root*, 95.
7. In construing statutes, the *intention* of the makers must be regarded, and what is within such intention is within the statute though not within the letter, and what is within the letter but not within the intention is not within the statute. *Ib.*
8. The term "*vacation*," in the act of 1809, ch. 125, refers only to the county courts and not to the Court of Appeals. *Ex-parte O'Neill*, 227.
9. Under the acts of 1829, ch. 216, and 1831, ch. 305, it is competent for a female eighteen years of age to execute a release to a party who *had been* her guardian, but had been removed and a new one appointed in his place, and for such party to *receive* such release. *McClellan & Wife, vs. Kennedy, et al.*, 230.
10. The 4th sec. of the act of 1818, ch. 193, dispenses with demand or notice of the decree before issuing process thereon required by the previous act of 1785, ch. 72, sec. 25, and applies to process of *sequestration* as well as other writs. *Keighler, et al., vs. Ward, et al.*, 254.
11. The act of 1841, ch. 161, prohibits the sale of the husband's tenancy by the curtesy, during the life of the wife, but still leaves in the husband the same life estate which he would have had prior to the passage of that law. *Anderson, et al., vs. Tydings, et al.*, 427, and *Logan vs. McGill & Wife*, 461.
12. The act of 1715, ch. 40, sec. 7, places *credits* upon the same footing as *goods and chattels*, and permits the garnishee to plead the attachment in *bar* only when it has proceeded to judgment *and execution had and made. Brown vs. Somerville*, 444.
13. The words of an act may be disregarded where that is necessary to arrive at the intention of the law-makers, but not where the act admits of only one interpretation. *Ib.*
14. The first sec. of the act of 1842, ch. 293, enables a wife to acquire title to any property real, and to slaves, in the mode therein specified, without the intervention of a trustee. *Logan vs. McGill & Wife*, 461.

CONTRACTS, CONSTRUCTION OF &c.

1. By a written contract the defendants agreed to pay the plaintiff a salary of $1000, payable in monthly instalments of $50 each, "if he sells for them, to such parties as they shall approve, $40,000 during the year, and for all sales above that amount, (deducting bad and doubtful debts,) two per cent. additional." The defendants were also to have the right to dismiss him at any time before the end of the year "by giving him a month's notice to that effect." HELD:

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CONTRACTS, CONSTRUCTIONS OF, &c.—*Continued.*

That the *equitable* construction of this contract is, that if defendants dismiss the plaintiff before the end of the year the latter is entitled to compensation *in proportion* to the amount he was to have received for the *whole year*, including both the contingent compensation of *two per cent.* and the *proportionate* part of the $1000, *provided* his sales for the fraction of the year were at the *rate of* $40,000 *per annum*, deducting *bad debts*. *Jenkins vs. Long & Byrne*, 132.

2. In construing contracts it is legitimate to suppose new and different aspects of the case from those which have actually arisen, in order to ascertain whether the rule of interpretation adopted makes every phase which the case *might assume* harmonise with each other. *Ib.*
3. Where a special contract to pay a certain sum for services for a year provides that the defendant may dismiss the plaintiff at any time during the year upon giving a month's notice, and the latter is *so dismissed;* the contract is not *violated* or *rescinded*, and the plaintiff must recover *upon it*, and cannot resort to a *quantum meruit*. *Ib.*
4. Evidence in a *quantum meruit* is admissible if the contract has been violated or abandoned by the defendant, or terminated by consent of both parties after it has been partly performed. *Ib.*
5. Evidence under a *quantum meruit* can only be resorted to where the special contract from having been either violated or rescinded is not sufficient to meet the case. *Ib.*
6. Where a contract has been fully executed, and nothing remains to be done but the payment of the money, the amount due may be recovered in *indebitatus assumpsit*, and in such case it is not necessary to declare upon or set out the special agreement. *Ib.*
7. But where the contract remains in full force it must, by virtue of its own terms, constitute the evidence of the agreement itself, even where the plaintiff relies alone upon the common counts; and no other evidence is admissible. *Ib.*
8. A party to a contract cannot, by his own act, prevent another from performing his engagement, and then complain that such other party has not kept its stipulations. *Parker Vein Coal Co., vs. O'Hern*, 197.
9. Where a party himself voluntarily purchases at trustee's sale land which another party had agreed to purchase at said sale and convey to him, such purchase, even with the consent of the other party, in the absence of any qualification of its legal effect, operates in equity as a waiver of the agreement. *Ib.*
10. A widow gave up her right to administer upon the estate of her husband, in consideration of receiving from the party in whose favor she relinquished, and who was a stranger to the estate, all the commissions except $100, and such party was appointed administrator by the orphans court. HELD, that this contract is valid and binding. *Bassett and Wife vs. Miller*, 548.

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See ORPHANS COURT, 3.
COMPOSITION WITH CREDITORS,
COMPROMISES OF SUITS, 1, 2.
BILLS OF EXCHANGE, &c., 1.
COVENANT, 1.

CONTRIBUTION AND SUBROGATION.

1. A creditor cannot so deal with one of his debtors in a joint contract as to prevent or *delay* the latter's right to contribution against his co-debtor, in case of payment of the debt. *Hurst and Berry vs. Hill*, 399.
2. A judgment debtor executed two mortgages of different portions of his estate, and after his death, upon a creditors' bill making all incumbrancers parties, the judgment creditors assented to a sale, reserving their liens, and under the decree a portion of the estate covered by the elder mortgage was sold, and the proceeds brought into court for distribution. HELD:
   That this fund must be applied to the prior judgments, and the rights of such judgment creditors cannot be suspended until questions of contribution or of subrogation can be adjusted, nor can they be compelled to resort to other lands yet unsold for the benefit of junior mortgagees. *Reigle vs. Leiter, et al.*, 405.
3. The elder mortgagee, upon the application of this fund arising from the property covered by his mortgage to the payment of elder judgments, will be *subrogated* to the rights of such judgment creditors. *Ib.*

CONVERSION.

See TROVER.

CORPORATIONS.

1. Municipal corporations are parts of the *State government* exercising delegated *political* powers for *public purposes*, and the rule exempting funds in the hands of one *State officer* due another from attachment, applies equally to the officers of such corporations. *Mayor and C. C. of Balto., Garn of Brashears, vs. Root*, 95.
2. The members and officers of public municipal corporations are officers of the government for the administration or discharge of public duties. *Ib.*
3. The act of 1825, ch. 114, sec. 2, authorising attachments on judgments to be laid in the hands of any "person or persons whatever, *corporate or sole*," does not include *municipal corporations*; they are *excepted* by reason and necessity. *Ib.*

COUNSEL FEES.

1. A trustee in insolvency cannot employ a professional adviser and charge his compensation to the estate; but where the assistance of counsel is required in prosecuting or defending the interests of *creditors*, compensation therefor is properly payable out of the funds. *Nelson vs. Pierson*, 300.

COVENANT.

1. A covenant to keep insured a *factory*, necessarily embraces the obligation to keep the fixed machinery, necessary to the operation of

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COVENANT—*Continued.*

the factory, insured, among which would be included the water-wheel, shafting and gearing; the term "*factory*" embraces such fixed machinery. *Mayhew vs. Hardesty*, 479.

2. The mortgagee of a term, after forfeiture, has the whole legal estate therein, and is liable on the *real covenants* in the lease whether he becomes possessed of or occupies the premises *in fact* or not. *Ib.*

3. To make a party liable under the covenants as assignee, he must be the assignee of the *entire term*, for otherwise he is but a mere *sub-lessee*, and as such not liable under the covenants. *Ib.*

4. A bond of conveyance executed by a purchaser of the lease, does not make such purchaser the *legal assignee* of the *entire term*, and he is not therefore liable under the covenants in the lease. *Ib.*

CREDITORS.

See INSOLVENT LAWS, &c., 1 to 3.
CONTRIBUTION, &c.
ASSIGNMENTS IN FAVOR OF,

CURTESY, TENANT BY.

See CONSTRUCTION OF ACTS, &c., 11.
HUSBAND AND WIFE, 3.

DEBT.

See PLEAS AND PLEADING, 6 to 11.

DEBTOR AND CREDITOR.

1. A debtor may prefer one creditor to another, provided the instrument designed to effect the object contains the requisite provisions. *Anderson, et al., vs. Tydings, et al.*, 427.

2. But if, through a *mistake in law*, the parties select and use such an instrument as cannot effect their object without the aid of a court of equity, the court will not correct the mistake by reforming the instrument, to the prejudice of the general creditors of a debtor in very embarrassed circumstances. *Ib.*

3. Where creditors, by reason of a *mistake in law*, in drawing a deed, have a legal advantage, a court of equity will not deprive them of it, by rectifying the deed for the benefit of parties whose claim rests upon *no stronger* equity than theirs. *Ib.*

See COMPOSITION WITH CREDITORS.
ASSIGNMENTS IN FAVOR OF CREDITORS.
CONTRIBUTION, &c.

DEED, EXECUTION AND CONSTRUCTION OF, &c.

1. Where a deed is executed and acknowledged by parties living in different counties and on different days, the presumption arising from its date, that it was delivered on that day, cannot stand against the positive averments in the acknowledgments, that it was executed afterwards. *Henderson vs. Mayor & C. C. of Balto.*, 352.

2. Questions arising upon the face of a deed, unconnected with parol proof, are for the decision of the court. *Ib.*

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DEED, EXECUTION AND CONSTRUCTION OF, &c.—*Continued.*

3. The validity of a deed of trust for the benefit of the creditors must be determined by the *deed itself*, without reference to extrinsic facts. *Malcolm, Trustee of Sprigg & Meseke, vs. Hodges*, 418.
4. A deed from two parties, "co-partners in trade," conveying "all and singular the stock of goods, machinery, book-accounts owing to" the grantors, "of whatsoever consisting," to hold the same *in trust*, to sell and apply the proceeds in part to such creditors as shall release the grantors "from all their liabilities, *individual as well as co-partnership*" operates as a conveyance of all the grantor's property, both *joint and separate*." *Ib.*
5. An *implied* reservation of the surplus, after paying the releasing or preferred creditors, to the grantor, avoids the deed equally with an *express* reservation, and the court cannot look outside of the deed to ascertain whether there will be a surplus or not. *Ib.*
6. Such an assignment, to be valid, must convey all the property of the debtor, and *in terms* dedicate the whole for the benefit of his creditors, subject to such preferences as may be declared in the deed. *Ib.*
7. A deed which makes no disposition of the surplus, after paying the releasing creditors, is *void*, because there is an implied reservation of such surplus to the grantor. *Ib.*

See MISTAKE.

MANUMISSION, 5.

DELIVERY.

1. The general plea of *non est factum* imposes on the plaintiff the *onus* of proving both the execution and *delivery* of the bond. *Edelin vs. Sanders*, 118.
2. Proof of execution and possession is *prima facie* evidence of delivery, and in the absence of all proof on the other side will entitle the obligee to a verdict. *Ib.*
3. The name of the obligee is a *material* part of a bond, and as a general principle delivery in *blank* is an insufficient delivery, unless recognized after the blank is filled up. *Ib.*
4. Materials for building a bridge, delivered by the contractor at the place designated by the bridge company, accepted and paid for by them in pursuance of the contract under which the bridge is to be built, are, upon the abandonment of the work by the contractor, (which contingency was provided for in the contract,) the *absolute property* of the company, and are not liable to attachment by the creditors of the contractor. *Pusey vs. Potomac Bridge Co.*, 470.

DEMAND AND REFUSAL.

See TROVER, 2 to 5.

DEVISE.

See WILL AND TESTAMENT, 4 to 8.

DISCLAIMER.

See LIEN, 1.

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EJECTMENT AND TRESPASS Q. C. F.

1. Where a patent is located by the plaintiff according to courses and distances and the calls are not located, it is admissible in evidence if *there be no counter-locations* of it by the defendant; but not if there be such *counter-location*. *Houck & Wife vs. Loveall*, 63.
2. Papers purporting to contain the defendant's locations and counter-locations *separate* from the plat and not *signed* by the sheriff or surveyor, and not referred to in their certificate accompanying the plats, cannot be treated as part of the proceedings under the warrant of survey. *Ib.*
3. But when such papers, though separate from the plats and not certified and signed, are referred to and returned with the certificate and plat, they will be regarded as part of the proceedings under the warrant. *Ib.*
4. In locating title papers, calls are to be gratified in disregard of course and distance, and *other tracts*, when called for, are as imperative as boundaries. *Ib.*
5. But it is not always necessary in such cases to locate the *entire tracts;* it is sufficient if the *lines* called for be located, though in ascertaining the correct position of such lines, it sometimes may be necessary to survey the whole tract. *Ib.*
6. In actions of *trespass q. c. f.* where defence is taken on warrant, the plaintiff must locate the *locus in quo* of the trespass, and show it to be within the lines of the land on which he alleges the act was committed. *Ib.*
7. No evidence as to the location of the lines called for in a patent unless such lines are located on the plat. *Ib.*
8. In an action of *trespass q. c. f.* and defence on warrant, if the plaintiff finds his locations unavailing, he cannot abandon them altogether and prove by parol his possession of the *locus in quo* and the trespass thereon, as if the plea were *non cul.* merely. *Ib.*

ERASURE.

See EVIDENCE, 4.

EVIDENCE.

1. The proceedings of a county court in Virginia, directing a will to be recorded and granting certificate to the executor to obtain probate thereof, are *judicial acts* to be authenticated under the act of Congress of 1790, ch. 38, and a copy of the will, in a transcript of such proceedings so authenticated, is admissible in evidence in the courts of this State. *Case vs. McGee*, 9.
2. The accounts of a guardian settled with the orphans court are but *prima facie* evidence of their correctness. *State, use of Manning, vs. Baker, et al.*, 44.
3. Proof of execution and possession is *prima facie* evidence of delivery, and in the absence of all proof on the other side will entitle the obligee to a verdict. *Edelin vs. Sanders*, 118.
4. The *seal* imports a consideration and the latter *as such* cannot be in-

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EVIDENCE—*Continued.*

quired into under the plea of *non est factum*, but the obligee may give in evidence anything which goes to show the bond was originally void at common law, as lunacy, fraud, coverture; or that it has become void subsequent to execution and before suit, as by *erasure, alteration*, &c. *Ib.*

5. Where there is proof that a bond has been *altered* facts tending to show *fraud* on the part of the obligee, by showing his relations and dealings with the obligor, are admissible under the plea of *non est factum*. *Ib.*
6. The *will* of a testator is not admissible in evidence for the executor in an action against such executor, because to allow it to be given in evidence would be to permit a party to testify in his own case and in his own behalf. *Ib.*
7. Evidence in a *quantum meruit* is admissible if the contract has been violated or abandoned by the defendant, or terminated by consent of both parties after it has been partly performed. *Jenkins vs. Long & Byrne*, 132.
8. Evidence under a *quantum meruit* can only be resorted to where the special contract from having been either violated or rescinded is not sufficient to meet the case. *Ib.*
9. But where the contract remains in full force it must, by virtue of its own terms, constitute the evidence of the agreement itself, even where the plaintiff relies alone upon the common counts; and no other evidence is admissible. *Ib.*
10. As a general rule, judgments and decrees cannot be used as evidence in other suits against persons who were not parties to them; but to this rule there are exceptions. *McClellan & Wife, vs. Kennedy, et al.*, 230.
11. The record of a suit against a former guardian *alone*, to vacate a release executed to him by his former ward, resulting in a decree annulling the release, is not evidence in a subsequent suit against persons not made parties to the former suit, though interested in sustaining the release. *Ib.*
12. Where a book in the handwriting of the plaintiff, purporting to contain an account between the parties, was produced by defendant, in pursuance of notice served on him by the plaintiff, the former is entitled to use it in evidence as any other memorandum of the plaintiff relating to their dealings. *Carroll vs. Ridgaway*, 328.
13. Where testimony is offered for *several* purposes and is admissible for any *one* of them a *general* objection to it will not be sustained, such an offer being regarded as a *general* offer. *Ib.*
14. In an action to recover money lost at play by the plaintiffs' clerk from the party to whom it was lost, the plaintiffs proposed to produce a collection book kept by the clerk, and to show that he had not entered therein certain sums collected by him as it was his duty to do. HELD, that this evidence was wholly *irrelevant* to the issue in this case. *Corner vs. Pendleton*, 337.
15. Where the right to recover depends upon several distinct proposi-

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EVIDENCE—*Continued.*

tions of fact, and the party fails in *either*, there is, in the language of the law, a *total failure* of evidence, and the court may so instruct the jury. *Ib.*

16. This total failure of evidence *also* occurs where the evidence is so slight and inconclusive, that no rational well constructed mind can infer from it the fact which it is offered to establish, and the jury would be left to draw deductions from wild speculation and conjecture. *Ib.*

17. Where the fact to be proved involves moral delinquency, the evidence should be so strong as to exclude the presumption of innocence, for innocence is presumed until guilt is proved. *Ib.*

18. Slight presumptions, although sufficient to excite suspicion or produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either amount to proof or shift the burthen of proof. *Ib.*

19. Where a number of such circumstances concur, they should be so strong as to satisfy the jury of the existence of the fact they are offered to establish; they must furnish more than the *probability* of the fact. *Ib.*

20. In a suit upon two notes given to the plaintiff under a contract, that he would forbear a sale under an execution against a third party, the defendant, (the administrator of the maker,) having offered evidence to show a failure of consideration for the contract, or an abandonment of its provisions by the plaintiff, the latter proposed to offer another agreement subsequently made between him and the *daughter* of the intestate, (the maker of the notes,) in reference to the same subject matter, and referring to and making disposition of these notes. HELD, that this latter agreement is *res inter alios* and inadmissible. *Basford, Adm'r of Hutchins, vs. Parran*, 360.

21. To overthrow the positive denials in an answer to the allegations of the bill they must be disproved by the testimony of *two* witnesses, or by *one* witness accompanied *with* pregnant circumstances. *Brooks, Trustee of Thomas, vs. Thomas & Jerome*, 367.

22. Though a proposition from a debtor for a composition with his creditors is not *conclusive* evidence of insolvency, yet it is one of the most *pregnant circumstances* from which to infer insolvency. *Ib.*

See BILLS OF EXCHANGE, &c., 5.
WILL AND TESTAMENT, 4.
EJECTMENT AND TRESPASS Q. C. F., for evidence in those actions.
WITNESS, 1, 2.

EXCEPTIONS.

1. Under the act of 1834, ch. 233, sec. 11, the court has a *discretion* as to what time the exceptions shall be prepared or signed, provided they are completed prior to the verdict, and the exercise of such discretion is not a subject of revision on appeal. *Roloson vs. Carson*, 208.

2. As a general rule, the most appropriate time to prepare an exception is immediately after the decision excepted to is made. *Ib.*

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EXECUTION.

1. The mere taking of property under a *fi. fa.* is not of itself equivalent to payment, and does not amount to a satisfaction of the judgment. *Campbell, Trustee of Harper, vs. Booth*, 107.
2. Since the act of 1841, ch. 161, the *rent* of a farm devised to a married woman cannot, *during the life of the wife*, be made liable to execution for the debts of the husband. *Logan vs. McGill & Wife*, 461.

EXECUTORS AND ADMINISTRATORS.

1. The act of 1720, ch. 24, which prohibits a suit upon a testamentary or administration bond, before a return of *non est* to a *capias* against the executor or administrator, is a *remedial statute*, and, as such, is to be *liberally* construed; its design is to make the principal pay instead of the surety. *State, use of Sprigg, vs. Jones, et al.*, 88.
2. Under this act an executor may *voluntarily* appear to the *capias* at any time during the *same term*, though after the return of *non est*, and thus prevent a suit on his bond. *Ib.*
3. The return of *non est* gives the right to sue the bond, and if such suit be brought *before* an appearance by the executor, a *subsequent* appearance by him cannot arrest it. *Ib.*
4. An executor has no power to execute deeds of manumission unless such deeds are authorised by the will. *Negro Henry Rozier vs. Holliday*, 381.
5. Under the laws of this State, a married woman may act as executrix or administratrix. *Binnerman vs. Weaver, et al.*, 517.
6. A widow gave up her right to administer upon the estate of her husband, in consideration of receiving from the party in whose favor she relinquished, and who was a stranger to the estate, all the commissions except $100, and such party was appointed administrator by the orphans court. HELD, that this contract is valid and binding. *Bassett & Wife, vs. Miller*, 548.

See JURISDICTION, 4.
ORPHANS COURT, 4.

FEES.

See COUNSEL FEES.

FORBEARANCE.

See PLEAS AND PLEADING, 1 to 4.

FRAUD.

See EVIDENCE, 5.

FRAUDULENT CONVEYANCES.

See ASSIGNMENTS IN FAVOR OF CREDITORS
PRAYERS, &c., 4, 5.
TROVER, 4, 5.

FREEDOM, PETITION FOR, &c.

See MANUMISSION.

GUARDIAN AND WARD.

1. The accounts of a guardian settled with the orphans court are but *prima facie* evidence of their correctness. *State, use of Manning, vs. Baker, et al.*, 44.

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GUARDIAN AND WARD—*Continued.*

2. Where the orphans court appoints a person guardian, expressly upon the ground that he agreed not to receive any allowance for the support of the ward, such appointment operates as a binding contract between the appointee and the court acting for the minor, which the latter may claim the benefit of by an action on the guardian's bond; the court in such case stands *in loco parentis* to the infant. *Ib.*
3. Under the acts of 1829, ch. 216, and 1831, ch. 305, it is competent for a female eighteen years of age to execute a release to a party who *had been* her guardian, but had been removed and a new one appointed in his place, and for such party to *receive* such release. *McClellan & Wife, vs. Kennedy, et al.*, 230.
4. In such case, the second guardianship had terminated by the arrival of the ward at the age of eighteen, and the second guardian had no power to receive and pass acquittances for the ward's property in the hands of the first guardian. *Ib.*
5. Settlements between guardian and ward, made recently after the office has terminated, are not favored, because the influence may be supposed still to continue; but this fact alone is not a fatal objection to a release executed by a ward. *Ib.*
6. A release after majority, based on information acquired before that time, will be upheld in equity if not otherwise objectionable. *Ib.*
7. But promises to execute a release, made by a ward when she was a mere child, are not binding upon her, and can have no effect in sustaining a release executed when she attained majority. *Ib.*
8. A release by a daughter eighteen years of age to her father, as guardian, but whose guardianship had ceased nine years before, made to repair wrongs done by the father to her half-sister, there being no proof of concealment, or of undue control or influence by the father over the mind of the daughter at that particular time, though gratuitous, is valid in favor of third parties who have acted upon the faith of its validity. *Ib.*
9. The record of a suit against a former guardian *alone*, to vacate a release executed to him by his former ward, resulting in a decree annulling the release, is not evidence in a subsequent suit against persons not made parties to the former suit, though interested in sustaining the release. *Ib.*

HABEAS CORPUS.

1. The Court of Appeals has *appellate* jurisdiction only, and as jurisdiction in a case of *habeas corpus* is *original* and not appellate in its character, this court cannot exercise it. *Ex-parte O'Neill*, 227.
2. But the individual judges of the court may, under the act of 1809, ch. 125, whether the court be in session or not, grant the writ of *habeas corpus during the vacation of the circuit courts.* *Ib.*
3. The acts of Assembly imposing duties upon the judges of the Court of Appeals in their *individual capacities* have not been abrogated by the new constitution, but apply in the same manner to the members of the present as to those of the former court. *Ib.*

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HABEAS CORPUS—*Continued.*

4. The power to hear and decide upon cases of *habeas corpus* may be claimed by the individual judges of the Court of Appeals, under that clause of the constitution which makes them "conservators of the peace throughout the State." *Ib.*
5. The term "*vacation*," in the act of 1809, ch. 125, refers only to the county courts, and not to the Court of Appeals. *Ib.*

HUSBAND AND WIFE.

1. Since the act of 1841, ch. 161, the *rent* of a farm devised to a married woman cannot, *during the life of the wife*, be made liable to execution for the debts of the husband. *Logan vs. McGill & Wife*, 461.
2. The first section of the act of 1842, ch. 293, enables a wife to acquire title to any property real, and to slaves, in the mode therein specified, without the intervention of a trustee. *Ib.*
3. The act of 1841, ch. 161, does not destroy the tenancy by the curtesy, but suspends the right of execution during the life of the wife, leaving the judgment lien perfect on the life estate of the husband, to be enforced on the death of the wife. *Ib.*
4. Under the laws of this State, a married moman may act as executrix or administratrix. *Binnerman vs. Weaver, et al.*, 517.

INDICTMENT.

1. An indictment, charging that the traverser, "on the 1st day of October 1854," obstructed a public highway, "and did, on divers other days between that day and the time of taking this inquisition, continue and allow to remain the said" obstruction, "by reason whereof the citizens of this State, *during the time aforesaid*," could not pass over the road, sufficiently charges the *continuance and existence* of the nuisance at the date of the inquisition, and therefore justifies a judgment to *abate it*. *Wroe vs. The State*, 416.

INJUNCTION.

See LIEN, &c., 2.
ATTORNEY AND CLIENT, 1.
PRACTICE IN EQUITY, 4.

INSOLVENT LAWS AND INSOLVENT DEBTOR.

1. A court of equity has power to vacate a deed executed by an insolvent debtor before his application for the benefit of the insolvent laws, but *not to* decree a sale of the property by a trustee of its own selection. *Jamison vs. Chesnut, et al.*, 34.
2. When such a deed is vacated, the title immediately vests under the insolvent system in the trustee in insolvency, who must make the sale and administer the assets under the direction of a court of law. *Ib.*
3. Where creditors file a bill to vacate such a deed, the insolvent trustee is a *necessary party* to the suit; and if such trustee be dead, a new one must be appointed by a court of law, under the fourth section of the act of 1805, ch. 110, before the bill is filed to which he must be made a party. *Ib.*

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INSOLVENT LAWS AND INSOLVENT DEBTOR—*Continued.*

4. The mere fact that a party was discharged under the insolvent laws, does not *necessarily* present a case of want of jurisdiction in a justice of the peace to render a judgment against him for a cause of action accruing prior to his application. *Deal vs. Harris*, 40.
5. Where an insolvent debtor makes a fraudulent transfer of money and personal property to a favored creditor, the trustee in insolvency may maintain an action at law therefor against the preferred creditor. *Teackle trustee of Cary, Wethered & Co., vs. Gibson*, 70.
6. Under the act of 1829, ch. 208, sec. 3, the *provisional trustee* has as full power to sue for and recover property fraudulently conveyed by the insolvent as the permanent trustee has. *Ib.*
7. Limitations will begin to run against such provisional trustee from the time of his appointment and qualification, and when once commenced, *continues* to run against the permanent trustee also. *Ib.*
8. The insolvent courts have no jurisdiction to compel the *executors or administrators* of deceased trustees to account in these courts for the trust estate. *Purviance, Trustee of Bosley, vs. Glenn's Exc'rs*, 202.
9. These courts have exclusive jurisdiction in the distribution of insolvents' estates and may proceed in a summary way against the *trustees* for default or neglect of duty. *Ib.*
10. In regard to the particular classes of trusts confided to them, these courts, in the exercise of a special authority, proceed upon principles of equity without being courts of equity. *Ib.*
11. The trustee of an insolvent may proceed to collect the property of the insolvent in courts having jurisdiction of the subject matter, as in other controversies, but when collected he must account for and distribute it in the insolvent court. *Ib.*
12. These courts proceed under special powers conferred by acts of Assembly, and the authority invoked must be shown to be within the limited jurisdiction. *Ib.*
13. In cases in insolvency, the right of appeal is given only to persons *aggrieved* by the decision of the court below, and the *trustee* has no right to object to the claims of creditors, and to appeal from an order allowing such claims, where the creditors themselves acquiesce, *Salmon, Trustee of Boon vs. Pierson*, 297.
14. He may appeal where the decision complained of affects the interests of *all the creditors* by diminishing the estate out of which they are to be paid, or where he is defeated in attempts to augment that fund by the recovery of property or money which he thinks belongs to the creditors. *Ib.*
15. If he has an interest as trustee in reference to his allowance for commissions and expenses, or as a creditor of the insolvent, he has an equal right, with others, to object to the distribution and to appeal. *Ib.*
16. A trustee in insolvency cannot employ a professional adviser and

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INSOLVENT LAWS AND INSOLVENT DEBTOR.

charge his compensation to the estate; but where the assistance of counsel is required in prosecuting or defending the interests of *creditors*, compensation therefor is properly payable out of the funds. *Nelson vs. Pierson*, 300.

17. A knowledge that a party is negotiating or compromising with his creditors, accompanied with the actual information that he *was generally considered insolvent in his neighborhood*, is, in contemplation of the act of 1834, ch. 293, *notice* of insolvency. *Brooks Trustee of Thomas, vs. Thomas and Jerome*, 367.

18. Though a proposition from a debtor for a composition with his creditors is not *conclusive* evidence of insolvency, yet it is one of the most *pregnant circumstances* from which to infer insolvency. *Ib.*

19. To avoid a transfer, under the act of 1834, ch. 293, the debtor must, at the time, have "no reasonable expectation of being exempted from liability or execution for or on account of his debts without applying for the benefit of the insolvent laws," and the preferred creditor must have *notice* of such condition of insolvency. *Ib.*

See JURISDICTION, 2.

TROVER, 4, 5.

PRAYERS, &c., 4, 5.

JUDGMENT, SATISFACTION OF, &c.

1. The mere taking of property under a *fi. fa.* is not of itself equivalent to payment, and does not amount to a satisfaction of the judgment. *Campbell, Trustee of Harper, vs. Booth*, 107.

2. Payment of a less sum than is due on a judgment, though received in full thereof, cannot operate as a discharge or satisfaction of the judgment. *Ib.*

3. An entry upon the docket of the *filing* of the receipt of the plaintiff's attorney for part of the sum due, *in full of the judgment* against *one* of the defendants, is not an entry of *satisfaction*, nor can it operate as a *release* of the judgment. *Ib.*

4. Such entry is not the act of the court but the clerk, merely noticing the filing of the receipt as usual in regard to papers filed in a cause. *Ib.*

5. Where an entry of satisfaction made by the clerk, by order of the plaintiff or his attorney, under the act of 1840, ch. 96, is relied on as a defence, the law must be *strictly complied* with. *Ib.*

6. Where a judgment in favor of the State is paid by a surety, there is no statute which authorises an assignment thereof to be made by the State, or by any officer or agent acting for the State, to such surety, and it cannot be done, under the act of 1763, ch. 23, sec. 8, by the *attorney* for the State. *Peacock, Assignee of the State, vs. Pembroke*, 348.

7. Under the acts of Assembly of this State payment to the attorney of the State is no satisfaction of the judgment in favor of the State, and his release or receipt is no discharge of it. *Ib.*

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JUDGMENT, SATISFACTION OF, &c.—*Continued.*

8. A disclaimer of title to land made by a party *after* judgments have been recovered against him, cannot destroy the *liens* of such judgments upon the legal rights which he had in the land at the time the judgments were recovered. *Anderson, et al., vs. Tydings, et al.*, 427.
9. Though an injunction stays an execution, yet the lien of the judgment is not lost or suspended, even during the continuance of the injunction. *Ib.*
10. A judgment with stay of execution till the happening of a contingency, or until a future specified time, is still a lien upon the estate of the defendant during the stay. *Ib.*

See CONTRIBUTION, 2, 3.
JUSTICE OF THE PEACE, 1, 2.

JURISDICTION.

1. If an inferior judge has *jurisdiction* and gives a wrong judgment, resulting from the erroneous conclusion at which he arrives, neither he nor the plaintiff in the action can be made a trespasser by enforcing the judgment if it remains unreversed and unpaid. *Deal vs. Harris*, 40.
2. The mere fact that a party was discharged under the insolvent laws, does not *necessarily* present a case of want of jurisdiction in a justice of the peace to render a judgment against him for a cause of action accruing prior to his application. *Ib.*
3. The 10th sec. of the 4th art. of the constitution, giving to the Court of Common Pleas "jurisdiction in all cases where the *debt or damage* claimed shall be over $100, and shall not exceed $500," does not confer upon that court any original jurisdiction in actions of *replevin*. *Blimline vs. Cohen*, 147.
4. The insolvent courts have no jurisdiction to compel the *executors or administrators* of deceased trustees to account in these courts for the trust estate. *Purviance, Trustee of Bosley, vs. Glenn's Ex'rs*, 202.
5. These courts have exclusive jurisdiction in the distribution of insolvents' estates and may proceed in a summary way against the *trustees* for default or neglect of duty. *Ib.*
6. In regard to the particular classes of trusts confided to them, these courts, in the exercise of a special authority, proceed upon principles of equity without being courts of equity. *Ib.*
7. These courts proceed under special powers conferred by acts of Assembly, and the authority invoked must be shown to be within the limited jurisdiction. *Ib.*
8. The Court of Appeals has *appellate* jurisdiction only, and as jurisdiction in a case of *habeas corpus* is *original* and not appellate in its character, this court cannot exercise it. *Ex-Parte O'Neill*, 227.
9. Jurisdiction once rightfully asserted by a court of equity, and which would lead to a settlement of all the questions which might arise

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JURISDICTION—*Continued.*

out of the subject matter in controversy, will exclude all jurisdiction over it by other courts for *similar purposes*. *Keighler, et al., vs. Ward, et al.*, 254.

10. But proceedings in equity, which contemplate giving *force* and *efficacy to a deed*, will not prevent the deed from being *assailed* as fraudulent in another court, or by another proceeding in equity. *Ib.*

See WILL AND TESTAMENT, 6.
PRACTICE IN THE COURT OF APPEALS, 3.
PRACTICE IN EQUITY, 1, 2.

JUSTICE OF THE PEACE.

1. If an inferior judge has *jurisdiction* and gives a wrong judgment, resulting from the erroneous conclusion at which he arrives, neither he nor the plaintiff in the action can be made a trespasser by enforcing the judgment if it remains unreversed and unpaid. *Deal vs. Harris*, 40.
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See JURISDICTION, 2.

LAND BROKER.

See ASSUMPSIT, 2.

LAW AND FACT.

1. Questions arising upon the face of a deed, unconnected with parol proof, are for the decision of the court. *Henderson vs. Mayor & C. C. of Balto.*, 352.

LIBEL AND SLANDER.

See CONSTRUCTION OF ACTS, &c.

LIEN.

1. A disclaimer of title to land made by a party *after* judgments have been recovered against him, cannot destroy the *liens* of such judgments upon the legal rights which he had in the land at the time the judgments were recovered. *Anderson, et al., vs. Tydings, et al.*, 427.
2. Though an injunction stays an execution, yet the lien of the judgment is not lost or suspended, even during the continuance of the injunction. *Ib.*
3. A judgment with stay of execution till the happening of a contingency, or until a future specified time, is still a lien upon the estate of the defendant during the stay. *Ib.*

See PRACTICE IN EQUITY, 12, 13.

LESSOR—LESSEE—LEASE.

See COVENANT.

LIMITATIONS.

1. In all cases of concurrent jurisdiction between courts of law and equity, the statute of limitations is equally obligatory in each court. *Teackle, Trustee of Carey, Wethered & Co., vs. Gibson*, 70.

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LIMITATIONS—*Continued.*

2. Limitation begins to run against the provisional trustee in insolvency from the time of his appointment and qualification, and when once commenced *continues* to run against the permanent trustee also. *Ib.*
3. Where a defendant, speaking in relation to the services of the plaintiff about a certain mill, said, "that as the mill had turned out unprofitably he thought plaintiff would not charge him anything, and that he did not think his charge ought to be more than at the rate at which plaintiff's brother had charged," it is a sufficient admission to relieve the claim for such services from the bar of the statute of limitations. *Carroll vs. Ridgaway*, 328.
4. A prayer that a claim is barred by limitations unless the jury find an assumption or promise by defendant within three years before bringing suit for the services rendered, correctly announces the law and should be granted. *Ib.*
5. Where a plaintiff files a replication to the plea of limitations and the defendant joins issue thereon, any irregularity as to the *time* of filing the plea is thereby *waived*. *Stockett, Adm'r of Locke, vs. Sasscer*, 374.
6. An acknowledgment to take a case out of the statute of limitations must be of a *subsisting* debt and equivalent to an implied promise to pay, and unaccompanied by any qualification or declaration, which, if true, would exempt the party from a moral obligation to discharge it. *Ib.*
7. The *whole* admission or conversation must be taken together, as well the acknowledgment as all qualifications or conditions, and one or more *isolated* expressions should not be seized upon. *Ib.*
8. Where a party admits the debt, but at the same time resists the payment of it, by alleging that he has a set-off and that the plaintiff owes him more money, it will not remove the bar of the statute. *Ib.*
9. Where a defendant, in conversation with the plaintiff about the claim, said in substance, that he would not plead limitations to a just debt, but that plaintiff's debt was not just, because it had been over-paid, it is not sufficient to take the claim out of the statute. *Ib.*
10. Where a debt is barred a *naked* promise *not to plead* the statute will not bind the defendant, though a promise to pay will be sustained as founded on the consideration of the original claim. *Ib.*
11. Where there are disputed accounts on both sides and each party claims a balance from the other, denying at the same time that he owes the other anything, an agreement to refer will not remove the bar of the statute. *Ib.*
12. If the acknowledgment be accompanied by such qualifying expressions or circumstances as repel the idea of an intention or contract to pay, no implied promise is created. *Ib.*
13. The acknowledgment must go to the fact, not only that the claim was originally just, but that it is *still due*. *Ib.*
14. An application to the orphans court to *revoke* letters of administration can only be made within the same time after the party applying has *knowledge* that letters had been granted as that provided by law, within which an *original application* for letters is to be made. *Edwards, Adm'r of Bruce, vs. Bruce*, 387.

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LIMITATIONS—*Continued.*

15. The courts, upon the principle of analogy, will, by construction, apply express statutory restrictions, in regard to time, to cases of similar character, where no such express legislative provisions exist. *Ib.*
16. This principle is peculiarly appropriate to testamentary affairs, because the testamentary laws clearly manifest an intention to guard against all needless delay, and secure as prompt and speedy settlements of estates as practicable. *Ib.*

MAGISTRATES' COURTS.

1. There is no analogy between the *terms* of the magistrates' courts, under the act of 1835, ch. 201, and the terms of the county courts. *Frazier vs. Griffis*, 50.
2. The magistrates' courts have no authority to strike out a judgment rendered at a previous meeting on the first day of their next meeting, by acting as of the *preceding term*. *Ib.*

MANUMISSION.

1. Since the act of 1831, ch. 281, a negro of *any age* is capable of receiving freedom by will according to the purposes and provisions of that act. *Negro Henry Rozier vs. Holliday*, 382.
2. Manumitted negroes may be sold for a term of years for payment of debts, where such sales will realise the sum required. *Ib.*
3. But when so sold they ultimately take their freedom *under the will alone*, and it is not necessary that the executor or administrator should execute deeds of manumission according to the terms for which they may be sold. *Ib.*
4. An executor has no power to execute deeds of manumission, unless such deeds are authorised by the will. *Ib.*
5. Where a manumitted negro is sold for a term of years to pay debts, he is under the protection afforded by the act of 1817, ch. 112, sec. 3, and if the *purchaser* sells him without executing a deed, as required by that act, he is entitled to freedom, provided the jury find fraud was intended in making the sale as provided by that act. *Ib.*

MISTAKE.

1. A debtor may prefer one creditor to another, provided the instrument designed to effect the object contains the requisite provisions. *Anderson, et al., vs. Tydings, et al.*, 427.
2. But if, through a *mistake in law*, the parties select and use such an instrument as cannot effect their object without the aid of a court of equity, the court will not correct the mistake by reforming the instrument, to the prejudice of the general creditors of a debtor in very embarrassed circumstances. *Ib.*
3. Where creditors, by reason of a *mistake in law*, in drawing a deed, have a legal advantage, a court of equity will not deprive them of it, by rectifying the deed for the benefit of parties whose claim rests upon *no stronger* equity than theirs. *Ib.*

See ARBITRATIONS, AWARD, 1, 2.

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MORTGAGE—MORTGAGOR—MORTGAGEE.

1. A clause in a mortgage of goods in a store, providing for "all *renewals* and substitutions for the same, the object being to include, not only the articles *then* in the store, but *whatever may be at any time therein*, in the course of the mortgagor's business," *cannot* convey *subsequently acquired* goods so as to give the mortgagee a right of action *at law* against a party seizing them. *Hamilton & Robinson, vs. Rogers*, 301.
2. Where the mortgagee sues for the taking of goods so mortgaged the *onus* is on *him* to show that the goods seized were on the premises at the date of the mortgage. *Ib.*
3. To enable him to recover to the extent of the goods on the premises at the date of his mortgage he must show that they were known to the defendant so to have been on the premises, or he must point them out *as such* to the officer making the seizure. *Ib.*
4. Where the property mortgaged is *commingled* with that subsequently acquired by the mortgagor it is presumed to be done with the mortgagee's permission, and if it be so intermixed as to prevent separation or identification, the rights of *third* parties cannot be affected thereby. *Ib.*
5. The mortgagee of a term, after forfeiture, has the whole legal estate therein, and is liable on the *real covenants* in the lease whether he becomes possessed of or occupies the premises *in fact* or not. *Mayhew vs. Hardesty*, 479,

See CONTRIBUTION, &c., 2, 3.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 1, 2, 3.

NEGROES AND SLAVES.

See MANUMISSION.

NOTARY PUBLIC.

See BILLS OF EXCHANGE, &c., 4, 5.

NOTICE.

See ARBITRATION, AWARD, 3.
PRACTICE IN EQUITY, 6.
INSOLVENT LAWS, &c., 17. 19.

NUISANCE.

See INDICTMENT, 1.

OFFICERS.

See ATTACHMENT, 1, 3.

ONUS PROBANDI.

See PLEAS AND PLEADING, 6.
MORTGAGE, &c., 2, 3, 4.

ORPHANS COURT.

1. Under the act of 1842, ch. 25, the orphans court may, upon suggestion, in writing, made by counsel, without making the apprentice a formal party, take proof and set aside his indentures. *Lammott vs. Maulsby*, 5.

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ORPHANS COURT—*Continued.*

2. The accounts of a guardian settled with the orphans court are but *prima facie* evidence of their correctness. *State use of Manning vs. Baker, et al.*, 44.

3. Where the orphans court appoints a person guardian, expressly upon the ground that he agreed not to receive any allowance for the support of the ward, such appointment operates as a binding contract between the appointee and the court acting for the minor, which the latter may claim the benefit of by an action on the guardian's bond; the court in such case stands *in loco parentis* to the infant. *Ib.*

4. An application to the orphans court to *revoke* letters of administration can only be made within the same time after the party applying has *knowledge* that letters had been granted as that provided by law, within which an *original application* for letters is to be made. *Edwards, adm'r of Bruce vs. Bruce*, 387.

5. The courts, upon the principle of analogy, will, by construction, apply express statutory restrictions, in regard to time, to cases of similar character, where no such express legislative provisions exist. *Ib.*

6. This principle is peculiarly appropriate to testamentary affairs, because the testamentary laws clearly manifest an intention to guard against all needless delay, and secure as prompt and speedy settlements of estates as practicable. *Ib.*

7. A widow gave up her right to administer upon the estate of her husband, in consideration of receiving from the party in whose favor she relinquished, and who was a stranger to the estate, all the commissions except $100, and such party was appointed administrator by the orphans court. HELD, that this contract is valid and binding. *Bassett & Wife, vs. Miller*, 548.

See WILL AND TESTAMENT, 1 to 3, 6.

PARTIES TO SUITS.

See PRACTICE IN EQUITY, 3.

PARTNERSHIP—PARTNERS.

1. If a partner without authority therefor, agrees to indemnify a surety on an injunction bond in a suit prosecuted for the benefit of the firm of which he is a member, his act does not bind the firm unless his co-partners subsequently acquiesced therein. *White vs. Davidson, et al.*, 169.

2. After dissolution, one partner cannot, by a new contract in the name of the firm, bind his late partner, even when the consideration is a debt of the firm. *Hurst & Berry, vs. Hill*, 399.

3. One partner cannot, after dissolution, impose new obligations on the firm nor *vary* the form or character of those already existing; he cannot *change* the form of the indebtment by giving a *new note* in the name of the firm. *Ib.*

4. Where a firm note was, after dissolution and after it was past due,

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PARTERNERSHIP—PARTNERS—*Continued.*

renewed by one partner giving a new note in the firm name, such new note is a *new contract* which cannot bind the other partner. *Ib.*

PATENT.

See EJECTMENT, &c., 1.

PAVING TAX.

See STREETS, &c., 1, 2, 3.

PAYMENT.

See JUDGMENT, &c., 1, 2, 7.

PERJURY.

See CONSTRUCTIONS OF ACTS, &c., 2.

PLEAS AND PLEADING.

1. In an action upon a promise made upon consideration of forbearance to file a *caveat* to a will, the declaration must show that the plaintiff was *interested* in setting the will aside. *Busby vs. Conoway*, 55.
2. It is a fatal objection to a declaration in such a suit that it fails to allege that the testator left *assets* after *payment of debts* in which plaintiff would have an interest. *Ib.*
3. In a suit for forbearance to sue the declaration must allege that there was a *debt due;* the allegation that a dispute and controversy existed respecting it is not sufficient. *Ib.*
4. In a suit based upon forbearance, the declaration must show that the forbearance promised by the plaintiff was either a detriment to him or a benefit to the defendant. *Ib.*
5. Where a defendant relies upon an appearance in another case in another court as having been properly entered, the plaintiff cannot reply and aver against the record that the appearance was not properly entered. *State, use of Sprigg, vs. Jones, et al.*, 88.
6. The general plea of *non est factum* imposes on the plaintiff the *onus* of proving both the execution and *delivery* of the bond. *Edelin vs. Sanders*, 118.
7. The *seal* imports a consideration and the latter *as such* cannot be inquired into under the plea of *non est factum*, but the obligee may give in evidence anything which goes to show the bond was originally void at common law, as lunacy, fraud, coverture; or that it has become void subsequent to execution and before suit, as by *erasure, alteration*, &c. *Ib.*
8. Where there is proof that a bond has been *altered*, facts tending to show *fraud* on the part of the obligee, by showing his relations and dealings with the obligor, are admissible under the plea of *non est factum*. *Ib.*
9. The *particular day* named in the *nar*, either in reference to the possession of the party whose goods have been converted or to the conversion, is an *immaterial averment* as to *time*. *Dietus vs. Fuss*, 148.
10. *Nil debet* is not a proper plea to an action of debt brought in this State upon a judgment recovered in the circuit court for the District of Columbia. *Hughes vs. Davis*, 271.

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PLEAS AND PLEADING—*Continued.*

11. A pending attachment may be pleaded in *abatement* to a suit against the garnishee by the defendant in the attachment, but to constitute a *bar* to such a suit there must be judgment of condemnation followed by *execution executed*, or *payment* or *satisfaction*. *Brown vs. Somerville*, 444.

See PRACTICE, 8, 9, 10, 11, 22.

PRACTICE.

1. In the absence of any rule of court on the subject, a witness may be asked on cross-examination whether he was not at the time of trial engaged in a bitter controversy with, and did not entertain feelings of great animosity and hostility towards, the party against whom he testifies. *Blessing vs. Hape*, 31.
2. The situation of a witness with respect to the parties and the subject of litigation, his interest, his inclination and prejudices, and his means of obtaining knowledge of the facts, may be submitted to the jury to enable them to determine the value of his testimony. *Ib.*
3. It is error for a court to withhold evidence from the jury, when, by so doing, the court would be deciding the very fact in issue presented by the pleadings, as this would be usurping the functions of the jury. *Frazier vs. Griffie*, 50.
4. Under the act of 1720, ch. 24, an executor may *voluntarily* appear to the *capias* at any time during the *same term*, though after the return of *non est*, and thus prevent a suit on his bond. *State, use of Sprigg, vs. Jones, et al.*, 88.
5. The return of *non est* gives the right to sue the bond, and if such suit be brought *before* an appearance by the executor, a *subsequent* appearance by him cannot arrest it. *Ib.*
6. The clerk of a court has no right to receive an appearance to a suit and make an entry thereof when the court is not in session. *Ib.*
7. Where a defendant relies upon an appearance in another case in another court as having been properly entered, the plaintiff cannot reply and aver against the record that the appearance was not properly entered. *Ib.*
8. Defences to a *scire facias*, that there was an outstanding *fi. fa.* in full force when the *sci. fa.* issued, or that the judgment was satisfied before issuing the writ, cannot be availed of upon *motion to quash*, but can only be taken advantage of by *plea*. *Campbell, Trustee of Harper, vs. Booth*, 107.
9. Irregularities apparent upon the face of a *scire facias* may be taken advantage of by *motion to quash*, but objections involving questions of fact only, or dependent partly upon matters of record and partly upon matters *in pais* must be *pleaded*. *Ib.*
10. Where a special contract to pay a certain sum for services for a year provides that the defendant may dismiss the plaintiff at any time during the year upon giving a month's notice, and the latter is *so dismissed*; the contract is not *violated* or *rescinded*, and the

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PRACTICE—*Continued.*

plaintiff must recover *upon it*, and cannot resort to a *quantum meruit*. *Jenkins vs. Long & Byrne*, 132.

11. Where a contract has been fully executed, and nothing remains to be done but the payment of the money, the amount due may be recovered in *indebitatus assumpsit*, and in such case it is not necessary to declare upon or set out the special agreement. *Ib.*
12. Under the act of 1834, ch. 233, sec. 11, the court has a *discretion* as to what time the exceptions shall be prepared or signed, provided they are completed prior to the verdict, and the exercise of such discretion is not a subject of revision on appeal.. *Roloson vs. Carson*, 208.
13. As a general rule, the most appropriate time to prepare an exception is immediately after the decision excepted to is made. *Ib.*
14. In case of bonds given to the State the uniform practice in this State has been to institute the suit in the name of the State, and to endorse on the writ and declaration the names of the parties for whose use and benefit it is prosecuted. *Ing, et al., vs. State, use of Lewis & McCoy*, 287.
15. In such cases, though the judgment is always entered up for the amount of the damages laid in the declaration, yet it is accompanied by a release, (which constitutes a part of it,) on payment of the sum awarded by the jury, court or referee, as the case may be. *Ib.*
16. The party for whose use the suit on such a bond is instituted is in fact regarded as the *real* plaintiff, though the State, technically speaking, is so. *Ib.*
17. It is incumbent on the party suing on such a bond to show that he has an interest in it before he can recover in a regular trial prosecuted to verdict. *Ib.*
18. Where a cause is referred under the act of Assembly, all matters are within the submission which could be introduced by *amendment* of the pleadings, and the reference *waives* the necessity for averring such matters in the declaration or other pleadings. *Ib.*
19. The referee has nothing to do with the particular issue joined in court, nor is it of any importance whether any issue be joined previous to the reference; the reference is a reference of the *whole case* to be tried on *its merits*. *Ib.*
20. Where testimony is offered for *several* purposes and is admissible for any *one* of them a *general* objection to it will not be sustained, such an offer being regarded as a *general* offer. *Carroll vs. Ridgaway*, 328.
21. Where a book in the handwriting of the plaintiff, purporting to contain an account between the parties, was produced by defendant, in pursuance of notice served on him by the plaintiff, the former is entitled to use it in evidence as any other memorandum of the plaintiff relating to their dealings. *Ib.*
22. Where a plaintiff files a replication to the plea of limitations and the defendant joins issue thereon, any irregularity as to the *time* of filing the plea is thereby *waived*. *Stockett, Adm'r of Locke, vs. Sasscer*, 374.

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PRACTICE——*Continued.*

See ORPHANS COURT, for practice in that court.

EJECTMENT AND TRESPASS Q. C. F., for practice in those actions.

PRACTICE IN EQUITY.

PRACTICE IN THE COURT OF APPEALS.

MAGISTRATES' COURTS.

JUDGMENT, &c., 1 to 5.

PLEAS AND PLEADING.

EVIDENCE, 7, 8, 9.

TROVER, for practice in that action.

BILLS OF EXCHANGE, &c., 3.

STREETS, &c., 3.

INDICTMENT.

ATTACHMENT, for practice in that action.

ARBITRATION AND AWARD, 9.

PRAYERS AND INSTRUCTIONS TO THE JURY.

PRACTICE IN EQUITY.

1. A court of equity has power to vacate a deed executed by an insolvent debtor before his application for the benefit of the insolvent laws, but *not to* decree a sale of the property by a trustee of its own selection. *Jamison vs. Chesnut, et al.*, 34.
2. When such a deed is vacated, the title immediately vests under the insolvent system in the trustee in insolvency, who must make the sale and administer the assets under the direction of a court of law. *Ib.*
3. Where creditors file a bill to vacate such a deed, the insolvent trustee is a *necessary party* to the suit; and if such trustee be dead, a new one must be appointed by a court of law, under the fourth sec. of the act of 1805, ch. 110, before the bill is filed to which he must be made a party. *Ib.*
4. The issuing of an injunction does not necessarily require a bond, for that is a matter resting in the discretion of the judge who is to order it. *White vs. Davidson, et al.*, 169.
5. The writ of *sequestration* is in full force in Maryland, both as a *mesne* process against a party in contempt and as a judical writ to enforce the performance of a decree, and in its latter office is analogous to an execution at law. *Keighler, et al., vs. Ward, et al.*, 254.
6. The fourth sec. of the act of 1818, ch. 193, dispenses with demand or notice of the decree before issuing process thereon required by the previous act of 1785, ch. 72, sec. 25, and applies to process of *sequestration* as well as other writs. *Ib.*
7. Jurisdiction once rightfully asserted by a court of equity, and which would lead to a settlement of all the questions which might arise out of the subject matter in controversy, will exclude all jurisdiction over it by other courts for *similar purposes*. *Ib.*
8. But proceedings in equity, which contemplate giving *force and efficacy to a deed*, will not prevent the deed from being *assailed* as fraudulent in another court, or by another proceeding in equity. *Ib.*

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PRACTICE IN EQUITY—*Continued.*

9. *Choses in action*, under certain circumstances, may be *sequestered;* if the party in whose hands the *chose* is admits the debt to be due, and is willing to pay it over under the order of the court, it is subject to *sequestration*, but *not otherwise*. *Ib.*
10. Where the party in whose hands the *chose* is denies that it is due to the decree-debtor, and sets up a deed of trust, under which he claims title, and avers it to be valid, the court will not, upon return to the writ of *sequestration*, inquire into the *validity* of such deed and determine whether it be *fraudulent* or not. *Ib.*
11. It is the *resistance* of the party holding the *chose* that defeats the proceeding by *sequestration*, and not the *grounds* upon which the resistance rests. *Ib.*
12. But where a party levies a *sequestration* upon such a *chose in action* he acquires thereby an *inchoate equitable lien or priority* to the fund contingent upon the result of the question, whether the deed is void or not. *Ib.*
13. In such case the return to the writ of *sequestration* should not be quashed, but the court should protect the inchoate equitable lien or priority thus acquired, by *retaining the case* until, by other proceedings, the validity of the deed can be determined. *Ib.*
14. The ratification of a chancery sale is *final* and *conclusive* unless irregularly made by the court, or unless the purchaser was prevented by misrepresentation, surprise or fraud, resulting from some act or conduct of the trustee or interested parties, from making his objections in due time. *Brown vs. Gilmor's Exc'rs, et al.*, 322.
15. The passage of an order of ratification *nisi* is not originating *new business*, but the mere continuation of an old proceeding, and it is no objection to such an order that it fixed a day for the final ratification *after* the Court of Chancery would cease to exist. *Ib.*
16. The jurisdiction of the Court of Chancery to pass such orders in pending cases was never suspended until the court itself expired, and then its jurisdiction passed to and continued in the court to which the case was removed, as if no removal had taken place. *Ib.*
17. From the passage of the order *nisi* to that of removal, the proper place to file objections to the sale was in the Court of Chancery, and *after* the removal they should be filed in the court to which the case is removed. *Ib.*
18. The order for removal transfers the jurisdiction, and from that moment the case, in legal contemplation, is in the court to which it is removed, whether the *papers* have actually been transmitted from one court to the other or not. *Ib.*
19. After the order for removal was passed the register in chancery had no power to receive any paper to be filed in the case. *Ib.*
20. An order *nisi* was passed by the chancellor, and the case was then removed to the Superior Court of Baltimore city, which passed the final order of ratification. HELD, that this is final and conclusive in the absence of misrepresentation, surprise or fraud, on the part of the trustee or other interested parties. *Ib.*

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PRACTICE IN EQUITY—*Continued.*

21. To overthrow the positive denials in an answer to the allegations of the bill they must be disproved by the testimony of *two* witnesses, or by *one* witness accompanied *with* pregnant circumstances. *Brooks, Trustee of Thomas, vs. Thomas & Jerome*, 367.

22. A decree dismissing so much of a bill as related to or sought to recover from the defendant as respects a certain note, is a final adjudication of that particular question unless appealed from in due time, and after the time for an appeal had passed the question cannot be revived by a petition for a rehearing, or by the fact that in the auditor's account the note was charged to the defendant, to which exceptions were filed and overruled, and from the order overruling them an appeal was taken in due time. *Hitch vs. Davis*, 524.

See CONTRIBUTION, &c., 2, 3.

MISTAKE.

PRACTICE IN THE COURT OF APPEALS.

1. Where a cause is remanded under the act of 1832, ch. 302, and a decree is passed in conformity with the decision of the appellate court, this decree must upon a second appeal be affirmed. *Eyler & Matthews vs. Hoover, Ex'cr of Crabbs*, 1.

2. A decree will not be reversed for an error by which the appellant has suffered no injury. *Ib.*

3. Since the act of 1841, ch. 163, the defendant cannot rely in this court upon any objection to the jurisdiction of the court below, unless it appears by the record that such objection was made below. *Teackle, Trustee of Carey, Wethered & Co., vs. Gibson*, 70.

4. Where a *defendant* pleads two pleas, one of which is overruled, and the other sustained and the bill dismissed, and the *complainant* appeals, this court will consider *both pleas*, and if either is a good defence, will affirm the decree dismissing the bill. *Ib.*

5. When there is nothing *in the record to show it* this court cannot *assume* that a bond was erased or altered after delivery, and can have no *judicial knowledge* of the fact if it existed. *Edelin vs. Sanders*, 118.

6. If upon inspection the bond appeared to have been altered the fact should be noticed in the exception either by agreement or by asking the opinion of an *expert* in handwriting his opinion as to its appearance. *Ib.*

7. A judgment will not be reversed because of a failure to grant a prayer which ought to have been granted, when all the advantage the appellant could have derived from such prayer was given him in a prayer granted at the instance of the appellee. *Canby vs. Frick*, 165.

8. Where the appellant has received *no injury* from an erroneous ruling of the court below, the case will not be sent back under a *procedendo*. *Roloson vs. Carson*, 208.

9. Under the act of 1834, ch. 233, sec. 11, the court has a *discretion* as to what time the exceptions shall be prepared or signed, provided

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PRACTICE IN THE COURT OF APPEALS—*Continued.*

they are completed prior to the verdict, and the exercise of such discretion is not a subject of revision on appeal. *Ib.*

10. Where this court can see from the admitted facts of the case that the appellants have no cause of action, a *procedendo* will not be ordered, though the prayer excepted to may be wrong. *Cline & Francis vs. Miller*, 274.

11. Decisions in which *no opinions* are filed will not be regarded as authority in other cases, unless the similarity is so apparent as to leave scarcely a doubt in regard to the propriety of applying the principles clearly shown to have been *necessarily* involved in and settled by the questions actually decided. *Edwards, Adm'r of Bruce, vs. Bruce*, 387.

12. Where the verdict was against the plaintiffs on the plea of *non assumpsit*, the judgment will not be reversed on his appeal for any error in an instruction in regard to the plea of *limitations*. *Hurst & Berry vs. Hill*, 399.

13. On the *second* appeal in a case whatever principles were settled on the *first* appeal must govern the appellate court, unless the record shows a materially different case. *Brown vs. Somerville*, 444.

See APPEAL.

PRAYERS AND INSTRUCTIONS TO THE JURY.

1. A prayer, that from the pleadings and evidence the plaintiff is entitled to recover a certain sum appearing by his account to have been allowed to a guardian, is defective in taking from the jury the finding of the truth of the facts set out in it. *State, use of Manning, vs. Baker, et al.*, 44.

2. Where a prayer on the part of the plaintiff requires the jury to find all that is essential to the plaintiff's right to recover, the addition of mere *surplusage* will not vitiate it. *Edelin vs. Sanders*, 118.

3. Where there is no evidence on which the hypothesis of a prayer could be based it must be rejected. *Ib.*

4. A prayer which leaves it to the jury to infer that a bill of sale was fraudulent and void as to creditors, from the fact, *simply*, that the grantor, at the time he executed it, was indebted to *several persons*, whose debts remained unpaid, without submitting to them any question as to the *amount* of such indebtedness or the extent of the grantor's means, or whether he was in embarrassed or insolvent circumstances, is defective. *Dietus vs. Fuse*, 148,

5. A prayer that the insolvent trustee could not recover against such grantee, unless the jury believe the bill of sale void under the *insolvent laws*, is defective, because though not void under those laws, the deed may still be void under the *Statute of Elizabeth*. *Ib.*

6. A prayer that the jury, in estimating the sum to be allowed the plaintiff for his services, "*should be guided by the custom in such like cases*," is defective, because it *assumes* the existence of such custom. *Canby vs. Frick*, 163.

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PRAYERS AND INSTRUCTIONS TO THE JURY—*Continued.*

7. A judgment will not be reversed because of a failure to grant a prayer which ought to have been granted, when all the advantage the appellant could have derived from such prayer was given him in a prayer granted at the instance of the appellee. *Ib.*

8. A prayer that an award is void because the arbitrators, without previous notice to, and in the absence of, the other, read an *ex-parte* affidavit of one of the parties, "though the jury believe it had *little or no* influence on the minds of the arbitrators," is defective, because it would have justified the jury in vacating the award for what they believed had *no effect* upon the decision. *Roloson vs. Carson*, 208.

9. A prayer that an award was void because of improper conduct of the arbitrators, without leaving to the jury to find any facts constituting the misconduct, is erroneous. *Ib.*

10. A prayer that an award is void because not in accordance with the submission as proved by *one witness*, is defective, there being *other witnesses* who testified in regard to the terms of the submission. *Ib.*

11. A prayer that a claim is barred by limitations unless the jury find an assumption or promise by defendant within three years before bringing suit for the services rendered, correctly announces the law and should be granted. *Carroll vs. Ridgaway*, 328.

12. Where the right to recover depends upon several distinct propositions of fact, and the party fails in *either*, there is, in the language of the law, a *total failure* of evidence, and the court may so instruct the jury. *Corner vs. Pendleton*, 337.

13. This total failure of evidence *also* occurs where the evidence is so slight and inconclusive, that no rational well constructed mind can infer from it the fact which it is offered to establish, and the jury would be left to draw deductions from wild speculation and conjecture. *Ib.*

14. A prayer that there is no evidence of the assent of certain parties, "and they *not having so assented* the plaintiff is not entitled to recover," is not objectional in form; the latter clause is but a *statement* of a reason for the conclusion of law and not the *assumption* of a fact. *Henderson vs. Mayor & C. C. of Balto.*, 352.

15. Where limitations and *non assumpsit* are pleaded, a prayer on the part of the plaintiffs overlooking the evidence under the plea of limitations, and directing the jury to find for him, though they may believe the facts set up as a bar under that plea, is defective in not being confined to the plea of *non assumpsit*. *Hurst & Berry vs. Hill*, 399.

PRESUMPTIONS OF LAW AND OF FACT.

1. Where the fact to be proved involves moral delinquency, the evidence should be so strong as to exclude the presumption of innocence, for innocence is presumed until guilt is proved. *Corner vs. Pendleton*, 337.

2. Slight presumptions, although sufficient to excite suspicion or produce an impression in favor of the truth of the facts they indicate,

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PRESUMPTIONS OF LAW AND OF FACT—*Continued.*

do not, when taken singly, either amount to proof or shift the burthen of proof. *Ib.*

3. Where a number of such circumstances concur, they should be so strong as to satisfy the jury of the existence of the fact they are offered to establish; they must furnish more than the *probability* of the fact. *Ib.*

4. Where a deed is executed and acknowledged by parties living in different counties and on different days, the presumption arising from its date, that it was delivered on that day, cannot stand against the positive averments in the acknowledgments, that it was executed afterwards. *Henderson vs. Mayor, &c. C. C. of Balto.*, 352.

See MORTGAGE, &c., 4.

PROCEDENDO. *See* PRACTICE IN THE COURT OF APPEALS, 8, 10.

PROBATE. *See* WILL AND TESTAMENT, 1 to 3.

PROBATE OF ACCOUNTS. *See* CONSTRUCTION OF ACTS, &c., 1 to 3.

RELEASE.

1. Where two or more parties are jointly bound the claimant may release one, and reserve his remedy against the others, *with their consent Campbell, Trustee of Harper, vs. Booth*, 107.

2. A release by a daughter eighteen years of age to her father, as guardian, but whose guardianship had ceased nine years before, made to repair wrongs done by the father to her half-sister, there being no proof of concealment, or of undue control or influence by the father over the mind of the daughter at that particular time, though gratuitous, is valid in favor of third parties who have acted upon the faith of its validity. *McClellan & Wife, vs. Kennedy, et al.*, 230.

3. Under the acts of 1829, ch. 216, and 1831, ch. 305, it is competen t for a female eighteen years of age to execute a release to a party who *had been* her guardian, but had been removed and a new one appointed in his place, and for such party to *receive* such release. *Ib.*

4. Settlements between guardian and ward, made recently after the office has terminated, are not favored, because the influence may be supposed still to continue; but this fact alone is not a fatal objection to a release executed by a ward. *Ib.*

5. A release after majority, based on information acquired before that time, will be upheld in equity if not otherwise objectionable. *Ib.*

6. But promises to execute a release, made by a ward when she was a mere child, are not binding upon her, and can have no effect in sustaining a release executed when she attained majority. *Ib.*

See JUDGMENT, &., 7.

REMOVAL OF CAUSES.

See CONSTITUTIONAL LAW, 5.
PRACTICE IN EQUITY, 16 to 20.

RENT. *See* HUSBAND AND WIFE, 1.

REPLEVIN. *See* JURISDICTION, 3.

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SALES BY TRUSTEES. *See* CONTRACT, &c., 9.
PRACTICE IN EQUITY, 14, 20.

SCIRE FACIAS.

1. Defences to a *scire facias*, that there was an outstanding *fi. fa.* in full force when the *sci. fa.* issued, or that the judgment was satisfied before issuing the writ, cannot be availed of upon *motion to quash*, but can only be taken advantage of by *plea*. *Campbell, Trustee of Harper, vs. Booth*, 107
2. Irregularities apparent upon the face of a *scire facias* may be taken advantage of by *motion to quash*, but objections involving questions of fact only, or dependent partly upon matters of record and partly upon matters *in pais* must be *pleaded*. *Ib.*

SEAL. *See* EVIDENCE, 4.

SEQUESTRATION.

1. The writ of *sequestration* is in full force in Maryland, both as a *mesne* process against a party in contempt and as a judicial writ to enforce the performance of a decree, and in its latter office is analogous to an execution at law. *Keighler, et al., vs. Ward, et al.*, 254.
2. The fourth sec. of the act of 1818, ch. 193, dispenses with demand or notice of the decree before issuing process thereon required by the previous act of 1785, ch. 72, sec. 25, and applies to process of *sequestration* as well as other writs. *Ib.*
3. *Choses in action*, under certain circumstances, may be *sequestered;* if the party in whose hands the *chose* is admits the debt to be due, and is willing to pay it over under the order of the court, it is subject to *sequestration*, but *not otherwise*. *Ib.*
4. Where the party in whose hands the *chose* is denies that it is due to the decree-debtor, and sets up a deed of trust, under which he claims title, and avers it to be valid, the court will not, upon return to the writ of *sequestration*, inquire into the *validity* of such deed and determine whether it be *fraudulent* or not. *Ib.*
5. It is the *resistance* of the party holding the *chose* that defeats the proceeding by *sequestration*, and not the *grounds* upon which the resistance rests. *Ib.*
6. But where a party levies a *sequestration* upon such a *chose in action* he acquires thereby an *inchoate equitable lien or priority* to the fund contingent upon the result of the question, whether the deed is void or not. *Ib.*
7. In such case the return to the writ of *sequestration* should not be quashed, but the court should protect the inchoate equitable lien or priority thus acquired, by *retaining the case* until, by other proceedings, the validity of the deed can be determined. *Ib.*

SLAVES. *See* MANUMISSION.

STREETS, PAVING OF, &c.

1. The ordinances of the city of Baltimore in relation to paving of streets, confer on *property owners*, not only the right to have their own lots improved by paving in front of them, but also the power to *compel*

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STREETS, PAVING OF, &c.—*Continued.*

others to submit to and pay for such supposed improvements. *Henderson vs. Mayor & C. C. of Balto.*, 352.

2. The paving tax is due immediately after the commissioners make out the lists of persons assessed, and its payment may be enforced before any portion of the paving is commenced. *Ib.*
3. The assent in writing of the proprietors of a majority of feet fronting on the street to be paved must appear to have been given before the paving is ordered, and the want of such assent may be shown as a defence to an action to enforce collection of the tax. *Ib.*
4. The certificate of the commissioners, stating that a requisite number of proprietors had assented to the paving, is not *conclusive* on the question of assent; it has but a *prima facie* effect as the warrant or authority to have the paving done, and those who act under it do so at their peril. *Ib.*
5. The authority of the commissioners as to paving of streets is special and limited, both as to its scope and effect, and when made the foundation of an action it must appear to have been exercised according to law. *Ib.*

SUBROGATION. *See* CONTRIBUTION, &c., 2.

SURETY. *See* JUDGMENT, &c., 6.

TAX. *See* STREETS, &c., 1 to 3.

TIME. *See* TROVER, 1.

TRESPASS. *See* JURISDICTION, 1.
EJECTMENT AND TRESPASS, Q. C. F.

TROVER.

1. *Trover* cannot be maintained without a conversion either direct or constructive, and which must be proved either directly or by inference. *Dietus vs. Fuss*, 148.
2. When the plaintiff fails to prove an actual conversion, he must give evidence of a *demand and refusal* made at a time when the defendant had the power to give up the goods. *Ib.*
3. A demand and refusal are only evidence of a prior conversion, which may be explained or rebutted by evidence to the contrary. *Ib.*
4. Where a party in insolvent circumstances sells property, and his *vendee* sells or disposes of it *after* the vendor petitions, or if *before* petition and while the goods are in his possession the vendor makes a *second sale*, which the first vendee subsequent to the petition *adopts or sanctions*, it will amount to a conversion by such vendee without a demand and refusal. *Ib.*
5. But the mere fact that a party before he petitions makes a fraudulent bill of sale of property, without any proof as to an actual conversion or a demand and refusal, will not justify a verdict in *trover* in favor of the insolvent's trustee against the grantee. *Ib.*
6. The *particular day* named in the *nar*, either in reference to the possession of the party whose goods have been converted or to the conversion, is an *immaterial averment* as to *time*. *Ib.*

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TRUSTEE IN INSOLVENCY.

See INSOLVENT LAWS, &c., 1 to 3, 5, 6, 7, 8 to 11, 13 to 16.

USAGE AND CUSTOM.

See PRAYERS AND INSTRUCTIONS TO THE JURY, 6.

WAIVER.

1. Where a party himself voluntarily purchases at trustee's sale land which another party had agreed to purchase at said sale and convey to him, such purchase, even with the consent of the other party, in the absence of any qualification of its legal effect, operates in equity as a waiver of the agreement. *Parker Vein Coal Co. vs. O'Hern*, 197.
2. Where a plaintiff files a replication to the plea of limitations and the defendant joins issue thereon, any irregularity as to the *time* of filing the plea is thereby *waived*. *Stockett, Adm'r of Locke, vs. Sasscer*, 374.

See ARBITRATION—AWARD.

WILL AND TESTAMENT, EXECUTION AND CONSTRUCTION OF.

1. The first two witnesses to a will *forty years old*, containing the usual attestation clause and purporting to be signed by the testator, were dead, but their signatures were proved, and also that they were *men of integrity and business habits*. The third and surviving witness proved his signature; that he was requested by the testator "*to come over and put his name to the will;* that he accordingly signed a paper in presence of the testator and one of the other witnesses, and never signed any other paper for him or at his request; but did not sign in the presence of the other witnesses, nor did the testator sign the will in his presence, nor does he recollect that the three witnesses were at any one time all present when the testator acknowledged the paper to be his will. HELD:

   That this will was properly admitted to probate, though there was no proof of the signature of the testator thereto. *Welty & Wife, vs. Welty, Exc'r of Hornaker*, 15.
2. The law looks with lenity upon the failure of the memory of witnesses to *ancient wills*. *Ib.*
3. It is not necessary that the witnesses to a will should sign it in the presence of each other, nor need they see the testator actually sign, nor need he acknowledge his signature to all the witnesses at the same time; the acknowledgment may be made to each witness separately. *Ib.*
4. Where there is no proof of the law of another State in regard to the construction of a will executed in that State, it must be construed by the law of this State. *McClellan & Wife, vs. Kennedy, et al.*, 230.
5. A testatrix devised a house and lot to "*Anna Maria German, wife of Jonathan German.*" Anna Maria was not the wife but the *daughter* of Jonathan German, and his wife was named *Catharine*. The daughter and wife both claimed the devise. HELD:

   Per Mason, J., That parol testimony was inadmissible to show whether the testatrix intended to devise the property to the *daughter* or the *wife;* that the question was one of construction from the *face of the will*, and the *wife* was entitled to the devise.

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WILL AND TESTAMENT, EXECUTION, &c.—*Continued.*

Per Tuck, J., That the devise was void, for *uncertainty;* and that the property descends to the heir at law as if the party had died intestate.

Per Eccleston, J., That upon a proper construction of the will, in connection with such evidence as was legally applicable to the case, the *daughter* is entitled to the property. *Stokeley vs. Gordon & Wife's Lessee*, 496.

6. A devise, that "my wife shall keep possession of all my property during the continuance of her life, provided she doth stay unmarried," without a bequest over in the event of marriage, will not defeat the life estate of the wife, it being against the policy of the law and in restraint of marriage. *Binnerman vs. Weaver, et al.*, 517.

7. A testator directed that his wife should "keep possession of all his estate" during her life, "provided she doth stay unmarried, to take care of the younger children and raise them up until the youngest child is eighteen years of age; but if she should die or get permanently diseased, or in any other way unable to attend to the duties of the will," then he appointed two other persons "as administrators and guardians of his estate and personal property." HELD:

1st. That the widow was entitled to a life estate in the property embraced in the will, subject to the trusts engrafted upon it in favor of the children.

2nd. Having settled her accounts fully in the orphans court, the jurisdiction of that court ceases, and a court of equity alone can enforce the trusts created by the will. *Ib.*

8. A devise to the city of Baltimore, in trust, "for the relief and support of the indigent and necessitous poor persons who may, from time to time, reside within the limits, as now known, of the twelfth ward of said city of Baltimore," is void as being too vague and indefinite, and the property vests in the next of kin of the testator, or his residuary devisees. *Wilderman vs. Mayor & City Council of Baltimore*, 551.

9. The right of the residuary devisees vested *immediately* upon the death of the testator, and it is not in the power of the legislature, by the subsequent act of 1842, ch. 86, to divest the vested rights acquired under the will, by giving that act a *retrospective* operation. *Ib.*

See EVIDENCE, 6.

WITNESS.

1. In the absence of any rule of court on the subject, a witness may be asked on cross-examination whether he was not at the time of trial engaged in a bitter controversy with, and did not entertain feelings of great animosity and hostility towards, the party against whom he testifies. *Blessing vs Hape*, 31.

2. The situation of a witness with respect to the parties and the subject of litigation, his interest, his inclination and prejudices, and his means of obtaining knowledge of the facts, may be submitted to the jury to enable them to determine the value of his testimony. *Ib.*

See WILL AND TESTAMENT, 1 to 3.

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